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REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO OCTOBER 4, 1915, AND ABSTRACTS
OF CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CXCIV
A. D. 1916.

**LAST FILING DATE OF REPORTED CASES:
FIRST DISTRICT, DECEMBER 21, 1915.**

**EDITED BY
THE PUBLISHERS' EDITORIAL STAFF**

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GALLAGHAN & COMPANY
1916**

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SEP 19 1916

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS

CORRECTED TO OCTOBER 4, 1915.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—WARREN W. DUNCAN.....Marion.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—GEORGE A. COOKE.....Aledo.

Fifth District—CHARLES C. CRAIG.....Galesburg.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Michigan Blvd. Bldg., Chicago.

WM. H. MCSURLEY, Presiding Justice, Michigan Blvd., Chicago.

JESSE HOLDOM, Justice, Michigan Blvd. Bldg., Chicago.

FRANK BAKER,* ex-Justice, Michigan Blvd. Bldg., Chicago.

BRANCH B.**

ALBERT C. BARNES, Presiding Justice, Michigan Blvd. Bldg., Chicago.

JOHN P. MCGOORTY, Justice, Michigan Blvd. Bldg., Chicago.

CHARLES A. McDONALD, Justice, Michigan Blvd. Bldg., Chicago.

BRANCH C.***

JOHN M. O'CONNOR, Presiding Justice, Michigan Blvd. Bldg., Chicago.

CLARENCE N. GOODWIN, Justice, Michigan Blvd. Bldg., Chicago.

THOMAS TAYLOR, Justice, Michigan Blvd. Bldg., Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Davless, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

*Died July 9, 1916.

**This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. ¶ 2981.

***Established under act of June .., 1911, J. & A. ¶ 2989.

CIRCUIT COURTS.

V

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Platt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

EDGAR ELDREDGE, Presiding Justice, Ottawa.

EMERY C. GRAVES, Justice, Geneseo.

GEORGE W. THOMPSON, Justice, Galesburg.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

HARRY HIGBEE, Presiding Justice, Pittsfield.

JAMES C. McBRIDE, Justice, Taylorville.

FRANK H. BOGGS, Justice, Urbana.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

DEWITT T. HARTWELL, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

*Laws 1897, 188, J. & A. § 3070.

Judges: J. C. EAGLETON, Robinson.
JULIUS C. KERN, Carmi.
CHARLES H. MILLER, Benton.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.
GEORGE A. CROW, East St. Louis.
J. F. GILLHAM, Edwardsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: WM. B. WRIGHT, Effingham.
JAMES C. McBRIDE, Taylorville.
THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermillion, Edgar, Clark, Cumberland and Coles.

Judges: JOHN H. MARSHALL, Charleston.
WALTER BREWER, Toledo.
AUGUSTUS A. PARTLOW, Danville..

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: GEO. A. SENTEL, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
CLYDE E. STONE, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: SAIN WELTY, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: WILLIAM T. CHURCH, Aledo.
FRANK D. RAMSAY, Morrison.
EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.
JAMES S. BAUME, Galena.
OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.
DUANE J. CARNES, Sycamore.
MAZZINI SLUSSER, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.
CHARLES H. DONNELLY, Woodstock.
CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex-officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—JOHN W. RAINEY, County Building, Chicago.

JUDGES.

RICHARD S. TUTHILL,
JESSE A. BALDWIN,
FRANK BAKER,*
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,
JESSE HOLDOM,
VICTOR P. ARNOLD,
DAVID M. BROTHERS,
CHAS. M. THOMSON,

DAVID F. MATCHETT,
JOHN GIBBONS,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOERTY,
FREDERICK A. SMITH,
CHARLES M. WALKER,
GEO. F. BARRETT,
THOMAS TAYLOR, JR.,
OSCAR M. TORRISON.

SUPERIOR COURT.

CLERK—RICHARD J. McGRATH, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
JOSEPH SABATH,
ROBERT E. TURNEY,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
HENRY V. FREEMAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENIS E. SULLIVAN,

*Died July 9, 1916.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge. ALLAN G. MacDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge. W. C. FLANNIGAN, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge. JOHN LISTMANN, Clerk.

THE CITY COURT OF BENTON.

R. E. HICKMAN, Judge. LORAN MORGAN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge. ERNEST HIPSLEY, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge. GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge. CORA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge. EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

HARRY W. McEWEN, Judge. JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge. HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

ROBERT H. FLANNIGAN, WILLIAM J. VEACH, Clerk.
W. M. VANDEVENTER, Judges

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge. CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge. JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.

WM. H. PARISH, JR., Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. VERNELL PERRY, Clerk.

THE CITY COURT OF JOHNSTON CITY.	
J. H. CLAYTON, Judge.	J. E. SULLINS, Clerk.
THE CITY COURT OF KEWANEE.	
H. STERLING POMEROY, Judge.	CHARLES L. ROWLEY, Clerk.
THE CITY COURT OF LITCHFIELD.	
DAN W. MADDOX, Judge.	LAURETTA SALZMAN, Clerk.
THE CITY COURT OF MACOMB.	
JOSIE WESTFALL, Judge.	WM. B. MARTIN, Clerk.
THE CITY COURT OF MARION.	
W. O. POTTER, Judge.	GEO. T. CARTER, Clerk.
THE CITY COURT OF MATTOON.	
JOHN McNUTT, Judge.	THOMAS M. LYTLE, Clerk.
THE CITY COURT OF MOLINE.	
G. O. DIETZ, Judge.	GEO. A. SCHRADER, Clerk.
THE CITY COURT OF PANA.	
J. H. FORNOFF, Judge.	G. W. MARSLAND, Clerk.
THE CITY COURT OF SPRING VALLEY.	
WILLIAM HAWTHORNE, Judge.	ANTON MUSATTE, Clerk.
THE CITY COURT OF STERLING.	
CARL E. SHELDON, Judge.	EARL L. HESS, Clerk.
THE CITY COURT OF WEST FRANKFORT.	
H. R. DIAL, Judge.	PEARL BEATTIE, Clerk.
THE CITY COURT OF ZION CITY.	
V. V. BARNES, Judge.	O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. §§ 3313 *et seq.*

FRANK P. DANISCH, Clerk.

CHIEF JUSTICE,

HARRY OLSON.

ASSOCIATE JUDGES.

HARRY M. FISHER	JOSEPH S. LABUY	SAMUEL H. TRUDE
EDWARD T. WADE	JOHN R. NEWCOMER	LEO DOYLE
JOHN K. PRINDIVILLE	JOHN R. CAVERLY	EDMUND K. JARECKI
JOSEPH P. RAFFERTY	CHAS. A. WILLIAMS	CHARLES N. GOODNOW
JOHN COURTNEY	JACOB H. HOPKINS	PATRICK B. FLANAGAN
JOHN J. SULLIVAN	HARRY P. DOLAN	DENNIS W. SULLIVAN
JOHN A. MAHONEY	J. W. BECKWITH	SHERIDAN E. FRY
WILLIAM N. GEMMILL	JAMES C. MARTIN	JOHN STELE
FRANK H. GRAHAM	ARNOLD HEAP	JOSEPH Z. UHLIR
DAVID SULLIVAN	JOHN J. ROONEY	HOSEA W. WELLS
HUGH J. KEARNS		

(7) COUNTY AND PROBATE COURTS. TOPICAL INDEX.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermilion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. § 3259.

JUDGES	COUNTIES.	COUNTY SEATS
LYMAN McCARL.....	Adams	Quincy.
MILES F. GILBERT.....	Alexander	Cairo.
WM. H. DAWDY.....	Bond	Greenville.
WM. C. DE WOLF.....	Boone	Belvidere.
WILLARD Y. BAKER.....	Brown	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau	Princeton.
JOHN DAY, JR.....	Calhoun	Hardin.
ARTHUR J. GRAY.....	Carroll	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass	Virginia.
ROY C. FREEMAN.....	Champaign	Urbana.
CHARLES A. PRATER.....	Christian	Taylorville.
A. L. RUFFNER.....	Clark	Marshall.
JOHN L. BOYLES.....	Clay	Louisville.
JAMES ALLEN.....	Clinton	Carlyle.
JOHN P. HARRAH.....	Coles	Charleston.
THOMAS F. SCULLY.....	Cook	Chicago.
HENRY HORNER, PRO. J.....	Cook	Chicago.
DUANE GAINES.....	Crawford	Robinson.
STEPHEN B. RARIDEN.....	Cumberland	Toledo.
WILLIAM L. POND.....	DeKalb	Sycamore.
FRED C. HILL.....	DeWitt	Clinton.
D. H. WAMSLEY.....	Douglas	Tuscola.
S. J. RATHJE.....	DuPage	Wheaton.
DANIEL V. DAYTON.....	Edgar	Paris.
PETER C. WALTERS.....	Edwards	Albion.
BARNEY OVERBECK.....	Effingham	Effingham.
FRED C. MEYERS.....	Fayette	Vandalia.
M. L. McQUISTON.....	Ford	Paxton.
NEALY I. GLENN.....	Franklin	Benton.
HOBERT S. BOYD.....	Fulton	Lewistown.
GEORGE L. HOUSTON.....	Gallatin	Shawneetown.
THOMAS HENSHAW.....	Greene	Carrollton.
GEORGE BEDFORD.....	Grundy	Morris.
J. S. SNEED.....	Hamilton	McLeansboro.
E. W. DUNHAM.....	Hancock	Carthage.

JUDGES	COUNTIES.	COUNTY SEATS
ARTHUR A. MILES.....	Hardin	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson	Oquawka.
LEONARD E. TELLEEN.....	Henry	Cambridge.
JOHN H. GILLAN.....	Iroquois	Watseka.
WILLARD F. ELLIS.....	Jackson	Murphysboro.
HARRY C. DAVIDSON.....	Jasper	Newton.
ANDREW D. WEBB.....	Jefferson	Mt. Vernon.
HARRY W. POGUE.....	Jersey	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson	Vienna.
S. N. HOOVER.....	Kane	Geneva.
JOHN H. WILLIAMS, Pro. J....	Kane	Geneva.
JAY H. MERRILL.....	Kankakee	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall	Galesburg.
R. C. RICE.....	Knox	Yorkville.
PERRY L. PERSONS.....	Lake	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
OTTO W. LONGNECKER.....	Lawrence	Lawrenceville.
JOHN B. CRABTREE.....	Lee	Dixon.
B. R. THOMPSON.....	Livingston	Pontiac.
CHARLES J. GEHLBACH.....	Logan	Lincoln.
JOHN H. MCCOY.....	Macon	Decatur.
ANDREW J. DUGGAN.....	Macoupin	Carlinville.
H. B. EATON.....	Madison	Edwardsville.
JOSEPH P. STREUBER, Pro. J....	Madison	Edwardsville.
WILLIAM G. WILSON.....	Marion	Salem.
DANIEL H. GREGG.....	Marshall	Lacon.
JAMES A. MCCOMAS.....	Mason	Havana.
LANNES P. OAKES.....	Massac	Metropolis.
CHARLES I. IMES.....	McDonough	Macomb.
DAVID T. SMILEY.....	McHenry	Woodstock.
JAMES C. RILEY.....	McLean	Bloomington.
JESSE M. OTT.....	Menard	Petersburg.
F. L. CHURCH.....	Mercer	Aledo.
HENRY SCHNEIDER.....	Monroe	Waterloo.
J. T. McDAVID.....	Montgomery	Hillsboro.
WM. E. THOMPSON.....	Morgan	Jacksonville.
JOHN T. GRIDER.....	Moultrie	Sullivan.
FRANK E. REED.....	Ogle	Oregon.
CHESTER F. BARNETT.....	Peoria	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria	Peoria.
LOUIS R. KELLY.....	Perry	Pinckneyville
WM. A. DOSS.....	Platt	Monticello.
PAUL F. GROTE.....	Pike	Pittsfield.
BENJ. F. ANDERSON.....	Pope	Golconda.

JUDGES	COUNTIES	COUNTY SEATS
FRED HOOD.....	Pulaski	Mound City.
IRVING E. BROADDUS.....	Putnam	Hennepin.
WM. M. SHUWERK.....	Randolph	Chester.
ROBT. B. WITCHER.....	Richland	Olney.
NELS A. LARSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
CHAS. D. STILWELL.....	Saline	Harrisburg.
JOHN B. WEAVER.....	Sangamon	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon	Springfield.
JOHN C. WORK.....	Schuyler	Rushville.
F. C. FUNK.....	Scott	Winchester.
A. J. STEIDLEY.....	Shelby	Shelbyville.
FRANK THOMAS.....	Stark	Toulon.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ROSCOE J. CARNAHAN.....	Stephenson	Freeport.
JAMES M. RAHN.....	Tazewell	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
LAWRENCE T. ALLEN.....	Vermillion	Danville.
W. J. BOOKWALTER, Pro. J...	Vermillion	Danville.
W. S. WILLHITE.....	Wabash	Mt. Carmel.
L. E. MURPHY.....	Warren	Monmouth.
W. P. GREEN.....	Washington	Nashville.
J. V. HEIDINGER.....	Wayne	Fairfield.
J. M. ENDICOTT.....	White	Carmi.
WM. A. BLODGETT.....	Whiteside	Morrison.
GEORGE J. COWING.....	Will	Joliet.
JOHN B. FITHIAN, Pro. J.....	Will	Joliet.
W. F. SLATER.....	Williamson	Marion.
LOUIS M. RECKHOW.....	Winnebago	Rockford.
ARTHUR C. FORT.....	Woodford	Eureka.

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The following table shows the Appellate Court cases reported in this volume in which certiorari has been applied for and denied, thus making the opinion of the Appellate Court final. (See Practice Act, sec. 121, J. & A. ¶ 8658.)

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1915

**L. Goldstein, Defendant in Error, v. Louis Basch &
Company, Plaintiff in Error.**

Gen. No. 20,443. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

Statement of the Case.

Action by L. Goldstein, plaintiff, against Louis Basch & Company, a corporation, defendant, in the Municipal Court of Chicago, to recover on a contract whereby plaintiff purchased certain earrings for two hundred dollars, paying one hundred dollars in cash and delivering certain other earrings valued at one hundred dollars. To reverse a judgment for plaintiff for one hundred and eighty dollars, defendant prosecutes this writ of error.

DONALD GROVER, for plaintiff in error.

HOMER K. GALPIN, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Casey v. Ladies Catholic Benev. Ass'n, 195 Ill. App. 2.

Abstract of the Decision.

1. **CONTRACTS, § 384***—*when evidence sufficient to show agreement for rescission.* In an action on a contract whereby plaintiff purchased certain jewelry from defendant, on an alleged agreement whereby plaintiff might rescind within a year and receive back the purchase price less ten per cent., evidence *held* sufficient to sustain a judgment for plaintiff.

2. **CONTRACTS, § 298***—*when tender of performance not necessary.* Where a party to a contract refuses to make performance thereof, formal tender of such performance by the other party is unnecessary.

3. **MOTIONS, § 9***—*when order impounding property in suit sufficient.* In an action on a contract whereby plaintiff purchased of defendant certain earrings, giving in payment certain other earrings, with a condition that plaintiff might rescind and receive back the purchase price under certain conditions, and where the court had ordered the earrings impounded, *held* that failure of the court to provide in such order that such earrings be delivered to defendant on satisfaction of the judgment for plaintiff was not erroneous, for the reason that such an order was not essential to the court's power to release the goods in its custody on affirmance of its judgment.

Margaret Casey, Defendant in Error, v. Ladies Catholic Benevolent Association, Plaintiff in Error.

Gen. No. 20,503. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915.

Statement of the Case.

Action by Margaret Casey, plaintiff, against the Ladies Catholic Benevolent Association, defendant, in the Municipal Court of Chicago, to recover on a benefit certificate wherein plaintiff was designated as beneficiary. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Casey v. Ladies Catholic Benev. Ass'n, 195 Ill. App. 2.

RYAN & CONDON, for plaintiff in error; IRVIN I. LIVINGSTON, of counsel.

JONAS & HESS, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE, § 826***—*when evidence sufficient to show waiver of by-law provision as to change of beneficiary.* In an action to recover on a benefit certificate issued by defendant to one Annie Mahon wherein plaintiff was named as beneficiary, where it appeared that defendant subsequently, at the request of insured, issued a new certificate wherein plaintiff was not named as beneficiary, and where it appeared that said Mahon's application for such change was not in conformity with defendant's by-laws, which required such application to be personally signed, the signature of said Mahon to such application being made in her presence by another by her direction, a peremptory instruction for plaintiff *held* error, where there was evidence of a waiver by defendant of the provisions of its by-laws.

2. **INSURANCE, § 885***—*when evidence admissible as to change of beneficiary.* In an action by a beneficiary to recover on a benefit certificate wherein plaintiff was named as beneficiary, where defendant offered in evidence an application by the insured named in such certificate requesting the designation of the beneficiaries and to designate others than plaintiff, which application was signed for insured by another person, in her presence and by her direction, *held* error to exclude such evidence, although defendant's by-laws required such application to be signed by insured personally, for the reason that the fact that defendant complied with the request of insured, and, on surrender of the old certificate, issued a new one wherein others than plaintiff were designated as beneficiaries, tended to show a waiver by defendant of the provisions of its by-laws relating to the matter of signature of such application, and that the contract under which plaintiff claimed had been superseded by another, authorized by insured and consented to by defendant.

3. **INSURANCE, § 826***—*when provision as to change of beneficiary may be waived.* Provisions of the by-laws of a fraternal beneficiary association prescribing that applications for a change of the designation of beneficiary must be signed by insured personally may be waived by such association, and, if so waived, it becomes immaterial

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

De Vries v. De Vries, 195 Ill. App. 4.

whether such by-laws were complied with or not, so far as the rights of beneficiaries are affected, as such provisions are for the benefit of the association and not of the beneficiary.

Arie de Vries, Appellant, v. Eva de Vries, Appellee.
Gen. No. 20,648.

1. **MARRIAGE, § 1***—*how distinguished from agreement to marry.* Although marriage is a civil contract and, as such, requires mutual assent of the parties thereto, yet there is a distinction between the contract itself and a mere agreement to marry, so that it is immaterial what the previous agreement was in a case where parties entered into a legal marriage which included the two essential elements of a marriage, i. e., capacity and consent.

2. **CONTRACTS, § 142***—*when antenuptial agreement not to cohabit after marriage void.* An agreement between parties to a marriage, made prior to the marriage, that no cohabitation should follow the marriage is void as against public policy, and neither party may repudiate it after the marriage.

3. **MARRIAGE, § 29***—*when refusal to cohabit does not avoid.* A refusal to cohabit does not render a marriage void, although such refusal may furnish grounds for its dissolution.

Appeal from the Superior Court of Cook County; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

HOLMES, MIX & CORKELL and OSCAR W. OLSON, for appellant; THOMAS J. HOLMES, of counsel.

No appearance for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

This is an action to annul a marriage on the ground of want of assent thereto or intention to marry. There was no defense. On the contrary, defendant, as a witness, corroborated complainant's testimony to the effect that they first met on a steamer coming from Holland to New York; that she was under contract

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

with a theatrical company from which she wished to be released, and concluding that marriage would effect the rescission of her contract with the company she later, on reaching Chicago, requested plaintiff to marry her for the purpose of effecting such object, with the understanding between them that there should be no consummation of the marriage relation by cohabitation. Accordingly a marriage license was procured and they were married in legal form, but they never cohabited. The court dismissed the bill for want of equity on the ground that such an arrangement was against public policy.

It is true, as urged by appellant, that marriage is a civil contract and like other contracts requires mutual consent of the parties thereto. But counsel for appellant fails to distinguish between an agreement to marry and the marriage contract itself. It matters not what the previous agreement was, so long as the parties had the capacity to enter into a marriage contract and in doing so mutually consented thereto in legal form. "If," as stated by Bishop on Marriage, Divorce and Separation, vol. 1, sec. 301, "the agreement between the parties is to dwell together substantially in the law's relation of husband and wife, they will be adjudged such, and any collateral stipulation contrary to law will be held null." Here the two things essential to the marriage existed—capacity and consent. Neither of the parties was under any disability that would vitiate the contract, and both knew what they were doing and intended what they did. The collateral stipulation before the ceremony, that they would not cohabit together, was null and either party had a right to repudiate it after the ceremony. While cohabitation is contemplated by marriage, refusal to cohabit does not render the contract void even though it may furnish grounds for dissolution of the marriage. One of the grounds for questioning the marriage in the case of *Brooke v. Brooke*, 60 Md. 524, was the same as urged

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here, but the court said it would convert the solemn rites of marriage into a delusion and fraud.

No cases are cited by appellant to support the contention that the previous agreement of the parties not to cohabit rendered the contract of marriage subsequently entered into void. The cases cited by him involve the question of want of capacity to enter into the contract, or where the consent was given in jest, or by mistake as to the legal effect of the ceremony, or as the result of duress or fraud. The decree will be affirmed.

Affirmed.

Overland Motor Company, Plaintiff in Error, v. W. G. Tennant, Defendant in Error.

Gen. No. 20,788.

1. **CONTRACTS, § 389***—*when construction a question for jury.* The question of the construction of a written contract is a question of law.

2. **CERTIORARI, § 54***—*what effect of denial of writ.* Denial of the Supreme Court of a writ of certiorari to review a judgment of the Appellate Court may in a particular case be regarded as an affirmation of the views expressed by the Appellate Court in the case sought to be reviewed.

3. **APPEAL AND ERROR, § 528***—*where writ of error presents no question for review.* Where questions of law which govern a case are not raised either by objections to rulings on evidence or on some motion, and no propositions of law are submitted to the trial court, an appeal or writ of error will present no questions for review.

4. **NEW TRIAL, § 124***—*when assignment of error on denial of motion insufficient.* Assignments of error based on the denial of a motion for a new trial in a case tried by the court without a jury, or on the denial of a motion in arrest of judgment, where the record shows no ground for such motion, are not well taken and a writ of error based thereon will present no questions for review.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Overland Motor Co. v. Tennant, 195 Ill. App. 6.

5. APPEAL AND ERROR, § 1040*—*when assignment of error not sufficient.* Assignments of error which do not point out the particular errors on which the assignments are predicated, which errors are not apparent from the record, are not well taken, and a writ of error based thereon presents no question for review.

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

WILLIAM A. JENNINGS, for plaintiff in error.

HENRY ROTH and CHARLES P. R. MACAULEY, for defendant in error.

MR. JUSTICE BARNES delivered the opinion of the court.

This was an action upon a written contract tried before the court without a jury. Whether the plaintiff, who is plaintiff in error here, was entitled to recover depended upon the construction the court put upon the contract, as practically admitted by the parties at the close of the evidence. That involved a question of law, but no propositions of law were submitted to the court to be held as such, nor were there any rulings on evidence that present the questions of law argued. We have no means, therefore, of determining what principles of law the court applied to the contract herein.

We held in *Flodin v. W. H. Lutes Co.*, 191 Ill. App. 195, that the necessity for submitting propositions of law to the trial court, in order to bring up for review the principles of law governing the case, obtains here as well as in the Supreme Court. Denial of a writ of certiorari in that case by the Supreme Court must be regarded as sustaining that view. The rule has been frequently applied in that court. *Swain v. First Nat. Bank of Hutchinson*, 201 Ill. 416; *Chicago, B. & Q. Ry. Co. v. City of Ottawa*, 165 Ill. 207; *Grabbs v. City of Danville*, 166 Ill. 441; *Jacobson v. Liverpool-London &*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Overland Motor Co. v. Tennant, 195 Ill. App. 6.

G. Ins. Co., 231 Ill. 61. In the *Grabbs* case, *supra*, the court said that where on a trial before the court without a jury a party desires to protect himself against any erroneous view the court may entertain in regard to the law which governs the case, he should pursue the mode provided in the statute for submission of written propositions of law, and that "unless this course is pursued, no question of law will be presented by the record for review on appeal or writ of error." This is a well-settled rule and obtains where the question of law is not raised otherwise by objections to the rulings of the court on the admission or exclusion of evidence or on some motion. *Chicago Union Traction Co. v. City of Chicago*, 202 Ill. 576. In the case before us there were no such rulings, and the only motions made by plaintiff in error were a motion for a new trial, which in a case tried by a court without a jury preserves no question for review (*Climax Tag Co. v. American Tag Co.*, 234 Ill. 179), and a motion in arrest of judgment, which there is nothing on the face of the record to justify. The assignments of error as to the refusal to grant these motions are, therefore, not well taken.

The other assignments of error are that the court erred in finding the issues for the defendant below, and in entering judgment against plaintiff in error, but the particular errors committed upon which these assignments were predicated are not pointed out, nor apparent from the record. There is, therefore, nothing presented for review, and the judgment will have to be affirmed.

Affirmed.

Weber Chimney Co. v. Brunswick-Balke-Collender Co., 195 Ill. App. 9.

Weber Chimney Company, Appellant, v. Brunswick-Balke-Collender Company, Appellee.

Gen. No. 20,813. (Not to be reported in full.)

Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915.

Statement of the Case.

Action by the Weber Chimney Company, a corporation, plaintiff, against the Brunswick-Balke-Collender Company, a corporation, defendant, in the Circuit Court of Cook county, to recover on a contract for building a chimney.

The action was for damages for a breach of contract, plaintiff averring, and introducing evidence tending to show that defendant broke the contract in not permitting plaintiff to proceed with the erection of a chimney, and defendant pleading as a defense that plaintiff had totally renounced the terms of the contract and its obligation to complete the construction of the chimney according thereto. The verdict was directed evidently on the theory that plaintiff's own evidence established such defense. The contract consisted of a written proposal and acceptance. Plaintiff's proposal was to erect a chimney at Dubuque, Iowa, of reinforced concrete construction 185 feet above the base of a foundation 12 feet below grade. The excavation and preparation of the ground therefor were to be made by defendant. The proposal was dated July 10, 1911, and called for prompt acceptance, which was given by letter two days later stating that the excavation would be completed about August 1st, but it was not in fact done until December 12th. In a letter in September, plaintiff expressed anxiety to do the work before cold weather. However, it undertook to perform its contract without any express modification of

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its terms. It laid the foundation in the four days following December 12th, when freezing weather set in. The evidence showed that cement will not set in a temperature below 26 degrees above zero without employing artificial heat, and that its use would have required much expense and the erection of a building around the chimney structure. It also showed that owing to delays in transporting the "form units" required for cement construction and increasing cold weather—the mean temperature most of the rest of December being below 26 degrees above zero, and in January below zero—no further work in actual construction was done. But the material therefor had already been shipped to Dubuque. The proposal contained these provisions: "Material will be shipped in five days from receipt of order to ship, and about fifty working days are required for the completion of the work. * * * The delivery, erection and completion promised are contingent upon strikes, accidents or other causes of delay beyond our control." On January 4th representatives of the parties had an interview in which the causes of delay as aforesaid were explained by plaintiff's representative, he saying, "we are going to do the best we can to get it done, and the fact that it has got into winter is not our fault." Defendant's representative asked if plaintiff would agree to complete the chimney by February 20th. Plaintiff's representative said it depended on the weather, that they were going to get the job done as soon as they could, but were not going to promise impossibilities. Defendant's representative expressed a purpose to cancel the contract against which plaintiff's representative protested. Two days later defendant's attorney called up the latter by telephone and asked if he would agree to complete the chimney by March 1st, to which he replied, "we will if we can, but it all depends on the weather." On January 9th defendant wrote plaintiff a letter referring to such conversation and saying it left no alternative

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but to cancel the contract, and taking the position that plaintiff had practically abandoned the contract. Plaintiff declined to accept the cancellation and evinced its readiness to proceed with the work. Plaintiff undertook to prove that the term "working days" had by usage a special meaning in the trade or commerce of concrete construction. Defendant contended that the words have a definite and settled meaning in commerce and jurisprudence, that of days as they succeed each other exclusive of Sundays and holidays; that the language of the contract was clear and unambiguous, and that parol evidence of its meaning was incompetent. While the court took defendant's view it nevertheless heard evidence on the subject out of the hearing of the jury, but in directing the verdict treated it as received. Plaintiff's evidence tended to show the expense it had incurred in preparation for and partial performance of the contract, its readiness to complete the same, and the cancellation thereof by defendant because plaintiff would not guarantee completion of the structure by February 20th or March 1st. From a judgment for defendant, plaintiff appeals.

RANKIN, HOWARD & DONNELLY and J. S. DUDLEY, for appellant.

RYAN & CONDON, for appellee; IRVIN I. LIVINGSTON, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 301*—*when extension of time for performance should be granted.* A contract whereby plaintiff agreed to construct a chimney for defendant in "about fifty working days," and which expressly provides that delivery within the time named is contingent upon causes of delay beyond the control of plaintiff, entitles plaintiff

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to a reasonable extension of such period depending upon causes which may excuse such delay, and such contract does not limit plaintiff to exactly fifty days in which it must complete such construction.

2. **CONTRACTS, § 322***—*what not equivalent to breach.* Where a contract provided that plaintiff should construct a chimney for defendant "in about fifty working days," and also expressly provided that the time named shall be contingent upon causes of delay beyond the control of plaintiff, and where plaintiff refuses to agree to complete the construction within a named time at the request of defendant, such refusal does not amount to a renunciation or abandonment of the contract by plaintiff, for the reason that plaintiff had a right to anticipate that the character of the work and the season of the year, which was winter, may cause delays which are excusable under the provisions of the contract and which may prevent the completion of construction within such named time.

3. **CONTRACTS, § 319***—*when breach does not arise before time for performance.* In an action to recover on a contract whereby plaintiff agreed to construct a chimney for defendant in "about fifty working days," and where defendant sought to cancel the contract claiming breach by plaintiff, the question whether evidence that a special meaning of the term "working days" obtained in the construction trade was competent as bearing on the question of a breach is immaterial where it appears by applying defendant's construction of the words to the facts in the case that no breach had taken place when defendant canceled the contract.

4. **APPEAL AND ERROR, § 1392***—*when refusal of peremptory instruction not error.* In an action to recover on a contract whereby plaintiff agreed to construct a chimney for defendant in "about fifty working days," where the facts proved did not amount as a matter of law to a renunciation of the contract by plaintiff, peremptory instruction for defendant *held* erroneous.

Eugene A. Bournique, Appellee, v. John B. Drake et al., on appeal of John B. Drake, Appellant.

Gen. No. 20,830. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM E. DEVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915. Rehearing denied October 15, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bournique v. Drake et al.; 195 Ill. App. 12.

Statement of the Case.

Suit by Eugene A. Bournique against John B. Drake and others for broker's commissions based upon the claim that plaintiff was the authorized agent of defendant to find a purchaser of certain real estate belonging to the estate of John B. Drake, Sr., and that he was the procuring cause of the sale thereof. It appeared that the property in question was purchased by the trustee of the estate of Marshall Field for \$1,100,000, that the property was first offered to the Field estate by Drake, but that the trustees were not then in a position to purchase it, that such property was located near the retail store of Marshall Field & Company and was desirable for the Field estate and that the purchasers and seller were acquainted with each other. The plaintiff had nothing to do with the negotiations in which the terms of sale were discussed, and though the evidence was conflicting, it tended to show that the purchasers treated the plaintiff's efforts with courtesy but finally took up the matter of purchasing directly with Drake. At the trial the plaintiff recovered a judgment for \$27,500, two and one-half per cent. of the selling price, and the defendant appeals.

WILSON, MOORE & McILVAINE, for appellant; N. G. MOORE, of counsel.

MILLER, GORHAM & WALES, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 37*—*when broker not procuring cause of sale.* Evidence held insufficient to show that a broker was the procuring cause of a sale of real estate, where the sellers had submitted the property to the buyer at the same price before the broker, and the vendee told the latter that knowing the sellers, the buyers would probably deal

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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directly with the vendor, and thereafter without the broker's aid or influence purchased directly from the sellers.

Charles J. Errant, trading as Chicago Special Construction Company, Appellee, v. Columbia Western Mills, Appellant.

Gen. No. 20,847. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed October 5, 1915.

Statement of the Case.

Action by Charles J. Errant, trading as Chicago Special Construction Company, against Columbia Western Mills, a corporation, to recover a balance claimed to be due under a written contract between plaintiff as contractor and defendant as owner. Such contract called for the construction of a large concrete tunnel for carrying steam pipes and conduits for carrying electric cables, and some incidental work at the price of \$8,000, of which \$6,000 was paid. The contract price was payable only upon certificates signed by the architect, and ninety per cent of the value of the work was payable on satisfactory completion. On completion of the tunnel, the plaintiff demanded payment of the "balance," but the architect notified him to complete the back-filling and replace fences as required by the contract. Later a portion of the tunnel caved in which the architect claimed the plaintiff should restore. The plaintiff continued his demands for a final certificate and on refusal commenced this action for the balance and some extras. Defendant denied legal liability and claimed grounds for recoupment. After the action was commenced the defendant per-

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formed the uncompleted work of back-filling, etc., for \$177.71 and repaired the tunnel for \$1,682.33. A judgment was rendered for the plaintiff, and defendant appeals.

JAMES B. KEOGH and M. PAUL NOYES, for appellant.

CHARLES R. NAPIER, ARTHUR C. BACHRACH, and OSCAR BLUMENTHAL, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. BUILDING AND CONSTRUCTION CONTRACTS, § 95*—*what plaintiff must prove in action on contract.* In an action by a contractor on a building contract where the plaintiff alleged full performance and a fraudulent refusal of the architect to issue a final certificate, it was incumbent on him to prove such allegations by a preponderance of the evidence.

2. BUILDING AND CONSTRUCTION CONTRACTS, § 21*—*when construction of contract is for court.* In an action on a building contract where the evidence was undisputed as to the work left undone, and the contractor claimed substantial compliance with the contract, the question of substantial compliance became a question of construction of the contract which was for the court.

3. BUILDING AND CONSTRUCTION CONTRACTS, § 4*—*how construed.* In construing a building contract, the court cannot ignore its express provisions.

4. BUILDING AND CONSTRUCTION CONTRACTS, § 25*—*when completed.* A building contract is not substantially completed when a substantial sum is required to complete the work.

5. BUILDING AND CONSTRUCTION CONTRACTS, § 25*—*how substantial performance is determined.* Where a contractor contends that a building contract was substantially completed, the importance of the uncompleted work is not to be tested by the proportion of its cost to the full contract price when, considered by itself, it was a material and substantial part of the work the contractor agreed to perform.

6. BUILDING AND CONSTRUCTION CONTRACTS, § 94*—*when matters pleaded must be proved.* In an action on a building contract where the contractor pleads full performance, he cannot recover on proof of waiver of performance.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Errant v. Columbia Western Mills, 195 Ill. App. 14.

7. BUILDING AND CONSTRUCTION CONTRACTS, § 100*—*what is incompetent evidence as to deduction from price.* In an action on a building contract, proof of an agreement between the plaintiff, a contractor, and an architect for deduction of the cost of unfinished work from the contract price was not competent on the amount to be deducted, as the actual cost of finishing the work was the best evidence of what should be deducted, unless it was a matter of express agreement and relied on as such.

8. BUILDING AND CONSTRUCTION CONTRACTS, § 83*—*when suit is premature.* In a suit by a contractor for a balance due on a building contract, where the contract provided that the balance was not due until thirty days after completion of the work, and only on certificates signed by the architect, a suit commenced before the expiration of such time was premature, and the plaintiff could not contend that the refusal of the architect to issue certificates before the expiration of such time was fraudulent.

9. BUILDING AND CONSTRUCTION CONTRACTS, § 83*—*what is condition precedent to suit.* Where a contractor's right to recover a balance due on a building contract depended upon obtaining an architect's certificate showing the amount due, the obtaining of such certificate was a condition precedent to any right of action which condition was to be strictly complied with, or good and sufficient excuse shown for noncompliance.

10. BUILDING AND CONSTRUCTION CONTRACTS, § 83*—*when arbitration is condition precedent to suit.* Where a building contract provided for arbitration in case of dissent from a decision of an architect, the refusal to issue a final certificate for the balance due under the contract was a decision by the architect, and in such case arbitration was a condition precedent to a right of action for the balance.

11. BUILDING AND CONSTRUCTION CONTRACTS, § 80*—*when suit is premature.* Where a building contract provided for payment of ninety per cent of the contract price on completion of the contract, and the balance thirty days afterwards, but the contractor demanded the entire balance on completion of the work, his demand was premature.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baker v. Benjamin et al., 195 Ill. App. 17.

Edward J. Baker, Appellee, v. J. Verne Benjamin and Fred Meyer, Defendants, on appeal of Fred Meyer, Appellant.

Gen. No. 20,860. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915. Rehearing denied October 11, 1915.

Statement of the Case.

Bill in equity to cancel a note and chattel mortgage by Edward J. Baker against J. Verne Benjamin and Fred Meyer. Plaintiff conducted a tin shop and went to Benjamin, a loan broker, to obtain a loan of five hundred dollars. The latter agreed to procure it, and Baker executed a note and chattel mortgage on the property in the tin shop which were delivered to Benjamin together with an assignment of accounts. Later, Benjamin gave his note to Meyer to cover an indebtedness and, as collateral thereto, Baker's note and mortgage. Meyer was advised that the Baker note was non-negotiable and called at the tin shop to inquire about the same but Baker was absent and his conversation was with Baker's brother. The Baker note was for five hundred and fifty dollars, but he was to receive only five hundred dollars. Baker signed and received a receipt for fifty dollars, but he claimed that no money was paid and the transaction was merely to cover up usury. This bill was filed because the loan was not consummated, and a receiver was appointed to take possession of the note, mortgage and assignment. The case was referred to a master who found that the fifty dollars for which the receipt was given was not paid, and that the assignment of accounts, note and mortgage were without consideration.

CHARLES E. SELLECK, for appellant.

Cregier v. Remus et al., 195 Ill. App. 18.

SAMUEL G. HAMBLÉN, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1399*—*when findings of master will not be disturbed.* A court's approval of a master's finding will not be disturbed on appeal unless obviously incorrect.

2. CANCELLATION OF INSTRUMENTS, § 12*—*when note and mortgage may be canceled.* A maker of a note and chattel mortgage is not estopped from having same canceled, after being transferred to a third person, when such note and mortgage are without consideration and no statement is made by the maker to the third person that there was a valuable consideration.

3. APPEAL AND ERROR, § 499*—*when question of receiver's compensation will not be reviewed on appeal.* Where a decree approves a receiver's report and discharges him, and there is nothing to indicate that the question of compensation was brought before the court, error cannot be assigned because the court did not take up such matter on its own motion.

DeWitt C. Cregier, Custodian, Appellee, v. George Remus et al., Defendants. A. J. Bedard, Appellant.
Gen. No. 20,863. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915.

Statement of the Case.

Bill of interpleader by DeWitt C. Cregier, as custodian of lost and stolen property for the department of police of the city of Chicago against George Remus and A. J. Bedard, attorneys at law, who claimed title

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cregier v. Remus et al., 195 Ill. App. 18.

to jewelry taken from the person of a prisoner named Stone. It appeared that in July, 1912, Stone was arrested in Chicago, and gave Remus one hundred dollars to procure a bondsman for him. Later he became a fugitive from justice and was arrested in Kansas City. Feeling under obligation to procure his return, Remus paid the expenses of Higgins, a Chicago policeman, to bring the prisoner back to Chicago. The jewelry found on Stone when rearrested in Kansas City was handed over to Higgins and, on his return to Chicago, he delivered it to Cregier as such custodian. Remus testified that when Stone was first arrested he agreed to pay him two hundred dollars as retainer out of which he was to pay the bondsman and expenses in the criminal case, and that after Stone paid the one hundred dollars aforesaid, he went to see Stone about the balance and Stone said that if Remus would get him out of jail, he would pay the balance of one hundred dollars upon getting out, and he would give him the jewelry in question, but Remus did not receive the jewelry from Stone at any time. On the contrary, it appears that Stone left the State when released from jail and took the jewelry with him, evidently with no intention of keeping his promise. After he was brought back to Chicago and lodged in jail, he engaged Bedard as his attorney and gave him a bill of sale of the jewelry of which Bedard promptly notified said custodian and the chief of police. Higgins testified that, while returning from Kansas City, the prisoner said the jewelry in question, then in custody of Higgins as officer, belonged to Remus and directed him to deliver it to Remus, but that later he offered it to him as the price of escape. Later still, Stone claimed the jewelry belonged to his wife. Remus testified that he asked Stone why he "jumped" his bond, and that he replied that Remus was secured by the jewelry for what he owed him. The prisoner denied both Higgins' and Remus' testimony. Before Higgins delivered the

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jewelry to Cregier, Remus gave him notice of his ownership. There was a finding and decree in Remus' favor, and Bedard appeals.

KING, BROWER & HURLBUT, for appellant.

GEORGE REMUS, *pro se*; MORRIS K. LEVINSON, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. ASSIGNMENTS, § 36*—*when assignment not shown.* Evidence held not to show an assignment, legal or equitable, of personal property by a client to an attorney, but rather a mere unfulfilled promise to deliver such property in the future as security.

2. INTERPLEADER, § 19*—*when allowance of attorney's fees erroneous.* Allowance of a portion of complainant's attorney's fees on a bill of interpleader, which fees were taxed to one of the defendant's, held error.

Lillian MacNeel, Appellee, v. N. J. Eisendrath, Appellant.

Gen. No. 20,866. (Not to be reported in full.)

Appeal from County Court of Cook county; the Hon. J. J. BARNES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

Statement of the Case.

Action by Lillian MacNeel against N. J. Eisendrath on an oral contract for employment for one year at twenty-five dollars per week, to recover for a portion of the year plaintiff was not given employment. The defense was that the contract was for service in a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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particular building afterwards destroyed by a flood, that the contract contemplated its continued existence, and that the destruction of the building terminated the contract and excused further performance. From a judgment for the plaintiff, defendant appeals.

DAVID S. EISENDRATH, for appellant.

MORSE IVES, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 601*—*when motion for new trial necessary.* The sufficiency of evidence to sustain a judgment will not be inquired into where the record does not show a motion for a new trial.

2. APPEAL AND ERROR, § 768*—*what record must show.* The question of error in the giving of an instruction will not be reviewed on appeal where the record does not show at whose instance any of the instructions were given.

3. MASTER AND SERVANT, § 82*—*what evidence is inadmissible in suit for wages.* In a suit on a contract of employment claimed to have been terminated by the destruction of the building where the plaintiff was employed, there was no error in rejecting proof of the defendant's contract for the building in question, as the only effect of the proof would have been to corroborate an undisputed question of fact.

P. Karen, L. Karen and Mendel Mandel, Appellees, v.
Bartholomae & Roesing Brewing and Malting Com-
pany, Appellant.

Gen. No. 20,898.

1. CONTRACTS, § 129*—*when contract void.* A contract made in violation of statute is void, and when a plaintiff cannot establish his cause of action without relying on an illegal contract he cannot recover.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Karen et al., v. Bartholomae & Roesing Brewing and Malting Co.,
195 Ill. App. 21.

2. INTOXICATING LIQUORS, § 52*—*when party cannot claim right of action for breach of contract to assign license.* An action for damages for breach of an alleged contract to reassign rights to the renewal or reissuance of a dramshop license, based on an invalid ordinance attempting to give a right of renewal to the licensee or his assignee, cannot be maintained, since the contract based on the invalid ordinance is void as against the statute, and in such case neither the exercise of official discretion nor a practice in renewing such licenses could form the basis of a contract right.

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed October 5, 1915.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
GEORGE A. KELLY, of counsel.

SABATH, STAFFORD & SABATH, for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

This is an action brought against appellant by appellee for damages for breach of an alleged contract to reassign the "rights to the renewal or reissuance of a dramshop license" issued by the city of Chicago. The jury returned a verdict for \$2,500. This appeal seeks reversal of the judgment entered thereon.

Appellees alleged that they were the owners of a license to conduct a dramshop in certain premises in Chicago; that by virtue of an ordinance under which said license was issued, they had a right to have it renewed or reissued to them for an additional term, and the right to assign such right of renewal or reissuance to some other person; that they made a contract with appellant whereby they assigned such right to appellant as security for the performance of certain obligations and whereby appellant, on performance of the same, was to reassign to them said rights, and that appellant refused to reassign them on demand and fulfillment of their obligations. Over defendant's objec-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Karen et al., v. Bartholomae & Roesing Brewing and Malting Co.,
195 Ill. App. 21.

tions proof of said ordinance, known as the Harkins ordinance, which attempts to confer the right of renewal or reissue of a license, was received and also proof of the commercial or market value of such rights in the city of Chicago, based on the custom or practice of the mayor to recognize such rights.

But it is a settled question in this State that there is no such right as that alleged to be the subject-matter of the contract, and upon the existence of which the cause of action depends. It was held in *People v. Harrison*, 256 Ill. 102, that the ordinance in question was invalid so far as it attempts to give a right of renewal to the licensee or his assignee, on the ground that it, in effect, authorized the issuance of a license to continue indefinitely contrary to public policy as expressed in the Dramshop Act prohibiting the issuance of a license to extend beyond the municipal year in which it may be granted.

The same questions are presented here that were raised in *Bartkowiak v. Malinowski*, 256 Ill. 119. There a decree to compel a specific performance of an agreement to reassign the right to the renewal and reissuance of a saloon license was reversed because said ordinance was held to be invalid so far as it attempted to confer such a right. There, as here, it was insisted that said right was a privilege of real value, but the court said: "No such right or privilege did, in fact, exist and any reassignment of this right * * * would be useless and of no effect." In view of this language, we think that the contention that such right was one of value because it was recognized by the custom and practice of the mayor of the city of Chicago is wholly untenable. Whether in all cases showing such practice there was a due exercise of a sound discretion we cannot tell, but it was not obligatory on the mayor to recognize such a practice, and the fact that new licenses have been issued to the same parties or

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their assignees for the same premises, under the circumstances then existing, may have been entirely consistent with the exercise of a proper discretion. But whether so or not, neither the exercise of official discretion nor a practice contrary to public policy can form the basis of a contract right.

It is manifest, therefore, that not only the alleged right which forms the basis of this suit never existed, but that the contract, so far as it rested on the invalid provisions of the ordinance, was void as against the statute (*Penn v. Bornman*, 102 Ill. 523), and gave no cause of action (*Bishop v. American Preservers' Co.*, 157 Ill. 284; *Ellison v. Adams Exp. Co.*, 245 Ill. 410; *McMullen v. Hoffman*, 174 U. S. 639). As said in the *Bishop* case, *supra*: "The general rule of law is that a contract made in violation of a statute is void, and that when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover."

As plaintiff cannot recover in law, defendant's motion for a directed verdict should have been granted, and the judgment will be reversed.

Reversed.

Assets Adjustment Company, Appellant, v. John P. O'Brien, Appellee.

Gen. No. 20,903. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. DAVID T. SMILEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

Statement of the Case.

Action by Assets Adjustment Company, a corporation, against John P. O'Brien. The declaration was upon an assignment of wages made to secure two cer-

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tain notes described therein. It averred that the plaintiff corporation acquired title to said notes in due course of business; that to secure them one of the makers thereof, then in the employ of the defendant, O'Brien, executed an assignment of his salary in writing, of which O'Brien was duly notified, and that said maker of the note had since such notification, while in the employ of said defendant, earned a sum in excess of the amount due on said notes. From a judgment sustaining a demurrer to the declaration, and dismissing the suit, plaintiff appeals.

JULIAN C. RYER, for appellant.

DANIEL P. TRUDE and T. J. LAWLESS, for appellee;
M. MARSO, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

ASSIGNMENTS, § 33*—*when declaration demurrable.* A declaration upon an assignment of wages to secure two notes, which fails to allege that the notes remain unpaid or that there was any demand for their payment, that the wages were due and payable at the time of commencement of suit, or that plaintiff is the actual bona fide owner thereof as required by section 18 of the Practice Act (J. & A. § 8555), is demurrable.

E. H. Johnson, Trustee, Appellee, v. Abraham M. Goldberg et al., trading as A. M. Goldberg & Brothers, Appellants.

Gen. No. 20,915. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Johnson v. Goldberg et al., 195 Ill. App. 25.

Statement of the Case.

Action by E. H. Johnson, trustee of the estate of Jacob Shynman, bankrupt, against Abraham M. Goldberg, Philip Goldberg and Morris Goldberg, trading as A. M. Goldberg & Brothers.

The original statement of claim averred that defendants agreed to pay Shynman's creditors \$5,022.12, and the amended statement, that they agreed to pay Shynman that sum for the benefit of his creditors.

The case was heard and submitted to the jury on the theory that plaintiff could recover only on an agreement by defendants to pay all Shynman's debts, and that they amounted to said sum.

Plaintiff's evidence tended to support his allegations, and defendants' tended to show that they agreed to pay Shynman only \$3,000 for Shynman's stock and machinery and incumbrances thereon, and that they performed their agreement.

The jury evidently accepted defendants' version of the contract but rejected their claim of payment. The jury were instructed, however, that unless they found the defendants agreed to pay all the debts of Shynman as charged in the statement of claim, they must find against the plaintiff and for defendants, and also that unless they found from the evidence that a definite amount was agreed upon between the parties, their finding should be for defendants. That Shynman's debts amounted to \$5,022.12 was not questioned. The verdict rendered was for \$3,000, and the defendants appeal.

E. N. ZOLINE and MORRIS K. LEVINSON, for appellants; MORRIS K. LEVINSON, of counsel.

SAMUEL J. ANDALMAN, for appellee; JACOB COHEN, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Hansen et al. v. Ferree, 195 Ill. App. 27.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1402***—*when verdict not sustained.* A verdict so inconsistent with the theory of the suit and instructions, and so irreconcilable with the evidence that it cannot be deemed otherwise than a mere compromise cannot be sustained on appeal.

2. **MUNICIPAL COURT OF CHICAGO, § 13***—*when variance is material.* A plaintiff cannot make one claim in his statement of claim and recover on an entirely different claim.

Marie Hansen and Herman Busch, trading as Hansen Busch Auto Company, Plaintiffs in Error, v. Albert G. Ferree, Defendant in Error.

Gen. No. 20,410. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

Statement of the Case.

Suit by Marie Hansen and Herman Busch, copartners, trading as Hansen Busch Auto Company, against Albert G. Ferree, based upon a verbal contract to recover for labor and material furnished in erecting and equipping an automobile.

All of the items of labor and material set forth in plaintiffs' affidavit of claim were disputed by the defendant. The principal contention, however, related to the number of hours of labor expended on said car. There was a trial by jury, who found the issues against the plaintiffs and judgment was entered thereon, whereupon the plaintiffs sued out this writ of error.

B. M. SHAFFNER, for plaintiffs in error.

GEORGE L. TURNBULL, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lueders & Co. v. Hudson Mfg. Co., 195 Ill. App. 28.

MR. JUSTICE MCGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. ASSUMPSIT, ACTION OF, § 88*—*what evidence is proper to show amount of labor furnished.* In a suit to recover for labor and material furnished in erecting and equipping an automobile, time cards showing the hours of work spent by servants on each automobile, which were properly identified, were erroneously rejected as evidence.

2. APPEAL AND ERROR, § 1253*—*when error in the exclusion of evidence cannot be complained of.* In an action to recover for labor and material furnished in erecting and equipping an automobile, error in the exclusion of time cards tending to show the amount of labor furnished cannot be complained of by the plaintiff where the record shows a recovery in excess of the amount which could have been recovered if such time cards had been admitted in evidence.

3. APPEAL AND ERROR, § 1410*—*when verdict not disturbed.* A verdict not manifestly against the weight of evidence will not be disturbed on appeal.

George Lueders & Company, Plaintiff in Error, v. Hudson Manufacturing Company, Defendant in Error.

Gen. No. 20,479. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 5, 1915.

Statement of the Case.

Action by George Lueders & Company, a corporation, against Hudson Manufacturing Company, to recover the purchase price of eighty-five pounds of vanilla beans. The receipt of the beans and the correctness of the purchase price were admitted by the defendant and a set-off was filed, in which the defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ant claimed that the beans contained formaldehyde and salicylic acid, and that an extract consisting of a maceration of said vanilla beans, grain alcohol, glycerine and sugar was found, upon chemical analysis, about eight months thereafter, to contain formaldehyde and salicylic acid, neither of which products being normal ingredients of vanilla beans, but are sometimes used as preservatives thereof. Defendant claims that said extract was unsalable and became a total loss.

No chemical analysis of the beans at any time was made by either of the parties. There were two shipments of beans of fifty pounds each, following the receipt by the defendant of a sample lot of beans of twenty-five pounds.

About two-thirds of the beans were used by the defendant and the remainder were returned to the plaintiff, credit being given therefor. Plaintiff, who was an importer of vanilla beans, denied that formaldehyde or salicylic acid was used by it as a preservative of said vanilla beans, or for any other purpose in connection therewith. There was a trial by jury, resulting in a verdict and judgment in favor of the defendant on its set-off for three hundred dollars, whereupon the plaintiff brought error.

HOYNE, O'CONNOR & IRWIN, for plaintiff in error;
CARL J. APPELL and HEYMANN F. TUCKER, of counsel.

LANNEN & HICKEY, for defendant in error.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 536*—*what is necessary to preserve objection for review.* A contention on appeal that a plaintiff who made no motion for a directed verdict at the close of the evidence cannot question the sufficiency of the evidence to sustain a verdict for the defendant is not well taken.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. EVIDENCE, § 461*—*what is sufficient to establish fact.* The fact that salicylic acid and formaldehyde are found in an extract made from vanilla beans and other ingredients, such as grain alcohol, glycerine and sugar, eight months after such extract was made is not sufficient evidence to show that the beans contained such acid or formaldehyde.

3. APPEAL AND ERROR, § 1402*—*when verdict will be set aside.* A verdict manifestly against the weight of the evidence will be reversed.

J. Wallace Wakem, Appellee, v. Colonial Trust & Savings Bank, Appellant.

Gen. No. 20,752. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN D. TURNBAUGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 5, 1915.

Statement of the Case.

Action by J. Wallace Wakem against the Colonial Trust & Savings Bank, a corporation, for the alleged conversion by said bank of a promissory note in the sum of \$2,000 made by John T. Cheney, under date of July 9, 1912, due four months from its date, bearing interest at the rate of six per cent. per annum, indorsed in blank by Clinton S. Woolfolk and the Realty Realization Company, and of forty shares of the capital stock of the said company which was attached to said note as collateral security. Plaintiff purchased the note from R. C. Keller, vice-president and cashier of the Colonial Trust & Savings Bank, and the note with the collateral attached was subsequently deposited with the bank for collection. The bank issued its receipt to plaintiff, under said date, reciting therein that it had received the note for collection. The plaintiff denied that he authorized the bank to deliver the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wakem v. Colonial Trust & Savings Bank, 195 Ill. App. 30.

note to the indorser, Woolfolk, and no written authority was given to the bank to deliver the note to such indorser.

Following the death of the indorser, Woolfolk, about five months after the maturity of the note, plaintiff for the first time, according to his testimony, learned that the bank had delivered the note to such indorser. Neither the note nor collateral has ever been found, and plaintiff has received no proceeds from either. There was a finding in favor of plaintiff, and judgment for \$2,183.46, whereupon defendants appeal.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellant; MITCHELL D. FOLLANSBEE and FRED BARTH, of counsel.

W. W. GURLEY and WALTER F. OLDS, for appellee.

MR. JUSTICE McGOORTY delivered the opinion of the court.

Abstract of the Decision.

1. **BANKS AND BANKING, § 152***—*when bank is liable for negligence.* If no authority is given to a bank to deliver a note to an indorser thereon for collection, such unauthorized act on the part of the bank constitutes negligence, and the bank is liable for any loss resulting therefrom.

2. **APPEAL AND ERROR, § 1396***—*when finding will be set aside on appeal.* Evidence held to justify a finding that a bank was not authorized to deliver a note to an indorser thereon for collection.

3. **APPEAL AND ERROR, § 1173***—*when propositions of law refused need not be considered on appeal.* Where no complaint is made as to propositions of law held by the court, which propositions correctly state the principles of law applicable to the evidence, it is unnecessary to consider objections to propositions of law refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Martin v. Martin, 195 Ill. App. 32.

Mary C. Martin, Defendant in Error, v. James Henry Martin, Plaintiff in Error.

Gen. No. 20,575.

1. **DIVORCE, § 110***—*when modification of decree awarding alimony is proper.* Where a provision for alimony in a decree takes the form of a weekly, monthly or yearly allowance, the power is expressly reserved by statute to modify such provision at any time according to the varying circumstances and needs of the parties, but where the decree awards a sum in gross for alimony, it is final and cannot be modified by the chancellor at subsequent term.

2. **DIVORCE, § 99***—*what is proper method of allowing alimony.* The ordinary and better method of awarding alimony is by an annual allowance, payable at such intervals as may best suit the convenience of the husband and meet the demands of the wife, such allowance being made upon the basis of the support and maintenance of the wife only, it being the duty of the husband to suitably support her.

3. **DIVORCE, § 99***—*when allowance of gross sum as alimony is proper.* To support a decree awarding a gross sum to the wife as alimony there must be some equitable consideration sufficient to warrant a departure from the usual rule governing the allowance of alimony, and the allowance should be made on the basis of support only, where the evidence does not disclose special equities in favor of the wife.

4. **DIVORCE, § 101***—*when allowance of alimony in gross is erroneous as to amount.* An award in gross of \$15,000 as alimony held erroneous, where the evidence showed that the only property of the defendant was a vested remainder in an estate which came to him through the will of his grandfather.

5. **DIVORCE, § 135***—*when allowance of solicitor's fees is error.* An allowance of \$1,000 for solicitor's fees in a divorce action is erroneous where there is no evidence as to the amount of services performed, or the value of the same.

Error to the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed in part, reversed in part. Opinion filed October 6, 1915.

HENRY J. GIBBS, for plaintiff in error.

SHERIFF, DENT, DOBYNS & FREEMAN, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Mary C. Martin, the defendant in error (hereinafter called the complainant), filed a bill for divorce against James H. Martin, plaintiff in error (hereinafter called the defendant), in the Superior Court of Cook county. The bill charges habitual drunkenness, and it further alleges that no children were born to the marriage and that the defendant is in receipt of an annual income of \$2,500 and "she is informed and believes has an interest in two estates, worth \$100,000." The defendant was personally served with summons but failed to file an appearance or answer and a default was entered against him. The cause came on for hearing before the Honorable Mazzini Slusser, acting as one of the chancellors of the said court. Ample evidence was introduced to prove the charge of drunkenness, in fact, the defendant does not question the propriety of the decree, in so far as it grants a divorce to the complainant. The complainant testified that the defendant had no property at that time, but that he would inherit some; that he told her he would inherit \$150,000 at the death of his mother. There was no testimony as to the income of the defendant. Evidence was introduced to the effect that the defendant had a vested remainder interest in a certain valuable estate in Tennessee; that the said interest was willed to the defendant by his grandfather and that the defendant would come into the enjoyment of the same upon the death of his mother. No evidence was introduced as to the amount or value of the services of the solicitors for the complainant. The decree provided "that the defendant pay to the complainant the sum of \$1,000 as and for her reasonable solicitor's fees and suit money, together with the costs of this proceeding, and also the sum of \$15,000 as alimony for the said complainant, and that execution issue therefor." The

Martin v. Martin, 195 Ill. App. 32.

decree was entered October 4, 1913, and on February 20, 1914, the defendant filed a petition before the Honorable John M. O'Connor, one of the chancellors of the said court, praying for a modification of that portion of the decree in regard to alimony and solicitor's fees. Upon a hearing, the chancellor found that there was "no material change in the circumstances of the defendant since the entry of the decree, except that now the said defendant is receiving a salary of \$100 a month, while at the time of the entry of the decree, he was receiving no salary whatsoever," and the motion to modify the decree was denied. The defendant sues out this writ of error.

No complaint is made as to the action of the last-mentioned chancellor in denying the motion to modify that portion of the decree in regard to alimony and solicitor's fees, and it is plain that the chancellor acted properly in that regard. Where the provision for alimony in the decree takes the form of a weekly, monthly or yearly allowance, the power is expressly reserved by the statute to modify such a provision of the decree at any time, according to the varying circumstances and needs of the parties, but in the present case the decree awarded a sum in gross for alimony, and such a decree is final, and the chancellor before whom the motion to modify was made had no power to change the same, the term at which the decree was entered having gone by. *Plotke v. Plotke*, 177 Ill. App. 344.

The defendant contends that the present case was not a proper one in which to award alimony in gross. Section 18 of the Divorce Act (Illinois Statutes, ch. 40, J. & A. ¶4233) reads as follows:

"When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just. * * * And the court may, on

application, from time to time, make such alterations in the allowance of alimony and maintenance, * * * as shall appear reasonable and proper.”

The ordinary and, as has been frequently said, the better method of awarding alimony is by an annual allowance payable at such intervals as may best suit the convenience of the husband and meet the demands of the wife. If the wife has no other claim than that which arises from the existence of the marriage relation, an allowance payable in the method stated, and which remains within the control of the court to increase or diminish from time to time as shall appear reasonable and equitable, is the proper mode of granting alimony. *Von Glahn v. Von Glahn*, 46 Ill. 134; *Griswold v. Griswold*, 111 Ill. App. 269; *Ross v. Ross*, 78 Ill. 402; *Keating v. Keating*, 48 Ill. 241; *Shaw v. Shaw*, 114 Ill. 586. Many other cases to the same effect might be cited. The allowance under this practice is made upon the basis of the support and sustenance of the wife only, it being the duty of the husband to suitably support and maintain her.

It has been repeatedly held that in certain cases it is proper under this statute to decree a sum in gross for alimony, providing justice and equity, in view of all the circumstances in the case, require it. To illustrate: Where the wife has brought money or property to the husband, or where property has been accumulated by the joint efforts of the husband and wife, it has been held to be a proper practice to award the wife a sum in gross as alimony. This practice is predicated upon the theory that in such cases equity and justice demand that the wife should share in the estate of the husband, and that the amount of the alimony be determined not merely by the necessities of the wife but also by the equities of the case. The decretal order, in such cases, in form, adjusts only the question of alimony, but in substance it also enforces the equitable rights of the wife. The practice in this State

Derby v. Novak, 195 Ill. App. 36.

seems to be well established that to support a decree awarding a gross sum to the wife as alimony there must be some equitable consideration sufficient to warrant a departure from the usual rule governing the allowance of alimony, and that the allowance should be made on the basis of support only, where the evidence does not disclose special equities in favor of the wife. *Dinet v. Eigenmann*, 80 Ill. 274; *Von Glahn v. Von Glahn*, *supra*; *Robbins v. Robbins*, 101 Ill. 416; *Ross v. Ross*, *supra*; *Shaw v. Shaw*, *supra*; *Cole v. Cole*, 142 Ill. 19.

Tested by the above rules, it is clear that the chancellor who entered the original decree erred in allowing the complainant \$15,000 in gross as alimony, as the evidence shows that the only property of the defendant was a vested remainder in an estate which came to him through the will of his grandfather.

The defendant also contends that as there is no evidence in the record as to the amount of the services performed by the solicitor for the complainant, or the value of the same, that the chancellor erred in allowing to the complainant \$1,000 for solicitor's fees. This contention is also meritorious.

For the reasons stated the decree of the Superior Court of Cook county, in so far as it relates to the allowance of alimony and solicitor's fees, is reversed, and in all other respects it is affirmed, and the cause will be remanded.

Affirmed in part, reversed in part and remanded.

Frank N. Derby, Plaintiff in Error, v. Edward J. Novak, Defendant in Error.

Gen. No. 20,596. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Derby v. Novak, 195 Ill. App. 36.

Statement of the Case.

Suit by Frank N. Derby against Edward J. Novak to recover a real estate broker's commission.

The defendant and a man named Gudichsen executed a written contract for the exchange of certain real estate. This contract was never consummated. The plaintiff was a broker in the transaction, and the said written contract contained the following provisions relating to commissions: "Brokerage fees to be paid as follows, to-wit: Party of the first part (Gudichsen) to pay to Frank N. Derby two hundred (\$200.00) dollars. Party of the second part (defendant in error), to pay to Frank N. Derby two hundred (\$200.00) dollars." In addition to this contract, the plaintiff also introduced evidence to the effect that he was to receive his commission from the defendant when he brought the latter and Gudichsen together in a valid, binding and enforceable contract. It is conceded that the plaintiff did bring the defendant and Gudichsen together in such a contract, but the defendant claimed on the trial that there was an oral agreement between the parties to this suit to the effect that the latter would not be entitled to any commission from the defendant until the contract between the latter and Gudichsen had been actually consummated, and some evidence, tending to prove this claim, was introduced.

The case was tried before the court without a jury, and a finding and judgment in favor of the defendant was entered, and this writ of error followed.

ARTHUR A. BASSE, for plaintiff in error.

DANIEL M. ROTHSCHILD, for defendant in error;
EDWARD J. NOVAK, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Crerar, Adams & Co. v. Brittain et al., 195 Ill. App. 38.

Abstract of the Decision.

BROKERS, § 71*—*what is not defense to action for compensation.* In a suit for broker's commissions, the fact that the broker recorded or caused to be recorded the written contract for the exchange of property, without authority from either the buyer or seller so to do, would not alone bar the broker's right to recover if he was otherwise entitled thereto.

Crerar, Adams & Company, Defendant in Error, v. John J. Brittain and M. B. Bushnell, trading as John J. Brittain Company, Plaintiffs in Error.

Gen. No. 20,617. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JABECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

Statement of the Case.

Action by Crerar, Adams & Company, a corporation, against John J. Brittain and M. B. Bushnell, trading as John J. Brittain Company, to recover the purchase price of 1,600 gallons of shingle stain, sold by the plaintiff to the defendants at thirty cents per gallon.

The defendants were engaged in the construction of sixteen frame cottages and two brick buildings for the Tuberculosis Sanitarium of the city of Chicago, and the shingle stain in question was to be used in staining the shingles on said cottages. The specifications under which the cottages and buildings were being constructed required a certain brand of shingle stain—"Cabot's No. 320"—to be used in staining the shingles on said cottages. The plaintiff made a proposition to the defendants that it would furnish them with a shingle stain *of the same composition and color as "Cabot's*

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crerar, Adams & Co. v. Brittain et al., 195 Ill. App. 38.

No. 320'' at thirty cents per gallon. The defendants accepted this offer by letter. The plaintiff delivered 1,600 gallons of the stain to the defendants, and after the latter had used 60 or 65 gallons of the said stain they were notified by the architects to stop using it as it was not the kind of stain (Cabot's No. 320) called for by the specifications. Thereupon, the defendants stopped using the stain furnished by the plaintiff and notified the plaintiff to remove the remainder of the same from the premises of the defendants and refused to pay the plaintiff for any of the stain delivered. The case was tried before the court without a jury, the issues were found for the plaintiff, and the damages were assessed at \$512. Judgment was entered on the finding and this writ of error followed.

WALTER A. LANTZ, for plaintiffs in error.

MEYER SHAPIRO, for defendant in error.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 328*—*what is question for jury.* In an action to recover the purchase price of a quantity of shingle stain, required to be of a certain composition and color, the question whether such stain conformed with the requirements was one of fact.

2. SALES, § 267*—*when finding of court proper.* Where a contract for the purchase of shingle stain required the stain to conform in composition and color to a specified brand, the evidence was *held* to support a finding that the stain which was sold was of the proper composition and colors as required by the contract, and the fact that the stain furnished was in fact superior to the brand specified would not make the finding inconsistent, there being evidence that any difference in the stains was due to mixing and preparation rather than to any difference in composition and color.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lorenz et al. v. Bloom et al., 195 Ill. App. 40.

Albert Lorenz and Arthur Lorenz, trading as Lorenz Brothers, Plaintiffs in Error, v. Harry Bloom et al., trading as Nidetz & Schnitzer, and Bernhard W. Berger, Defendants in Error.

Gen. No. 20,644. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed October 6, 1915.

Statement of the Case.

Action by Albert Lorenz and Arthur Lorenz, co-partners, trading as Lorenz Brothers, against Harry Bloom, M. Nidetz and L. Schnitzer, copartners, trading as Nidetz & Schnitzer, and Bernhard W. Berger, under the Mechanic's Lien Act of 1903 (J. & A. ¶7139 *et seq.*), to recover \$435, with interest thereon from May 17, 1913, alleged to be due to the plaintiffs from the defendants for labor and material furnished by the plaintiffs as subcontractors. The case was tried before the court without a jury, the issues were found against the plaintiffs, and judgment was entered on the finding. This writ of error followed.

D. E. McCracken, for plaintiffs in error; J. H. PERKINSON, of counsel.

LOUIS F. JACOBSON, for defendants in error.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 147*—*when proceedings to enforce are premature.* A suit to enforce a sub-contractor's lien brought six days after service of notice of lien on the owner of the premises is premature and should be dismissed without prejudice.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Gall, 195 Ill. App. 41.

2. **MECHANICS' LIENS, § 147***—*what is effect of premature suit.* The fact that a suit to enforce a mechanic's lien is prematurely brought does not destroy the lien of the plaintiffs.

**City of Chicago, Defendant in Error, v. William Gall,
Plaintiff in Error.**

Gen. No. 20,671.

1. **LICENSES, § 10***—*what is effect of license under ordinance licensing vehicles.* Section 2597 of the Chicago Code of 1911, requiring licensed vehicles to have a card stating the name of the owner and number of the license, and also the rates of fare and regulations as to baggage, applies only to persons who not only take out a license under article II, but who thereafter engage in the business covered by the license.

2. **LICENSES, § 1***—*what is license.* A license is a permission or privilege granted by the State, directly or indirectly through the medium of a municipality, to perform certain acts or to carry on a certain business which, if done without such license, would be illegal.

3. **LICENSES, § 1***—*what is nature of license.* A license of an automobile for carrying persons for hire does not create any contract between the city and the licensee, and the acceptance of the same does not impose any obligation upon the licensee to follow the business covered by the license.

4. **MUNICIPAL CORPORATIONS, § 864***—*when presumption does not arise in suit for violation of ordinance licensing vehicles.* In a prosecution for failing to display a rate card, where the defendant is licensed to operate automobiles for hire, there is no presumption of law that the defendant actually engaged in the business covered by the license from the mere fact that he had taken out such license.

5. **MUNICIPAL CORPORATIONS, § 860***—*what is nature of suit for violation of ordinance.* An action against a person licensed to operate automobiles for hire, for the failure to display a rate card is penal in its nature, though a civil suit, and the city is bound to prove clearly that the defendant has violated the ordinance in question.

6. **MUNICIPAL CORPORATIONS, § 864***—*what evidence is competent in suit for violating ordinance.* In a prosecution of a person licensed to operate automobiles for hire, because of the violation of a regulation requiring rate cards to be posted, evidence that the defendant was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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not engaged in the business covered by the license was competent and should have been admitted.

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

SHERIFF, DENT, DOBYNS & FREEMAN, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error; ULYSSES S. SCHWARTZ, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

On May 23, 1914, a complaint was filed in the Municipal Court of Chicago, charging William Gall, the plaintiff in error, hereinafter called the defendant, with a violation of section 2597 of the Chicago Code of 1911. The material part of the complaint is as follows:

“P. J. Timmons, being first duly sworn, on his oath deposes and says that Wm. Gall, late of said City of Chicago, on the 22d day of May, A. D. 1914, at the City of Chicago aforesaid, did then and there operate a motor vehicle for hire upon the public streets, and did fail to have a rate card of fares posted in the said motor vehicle in a conspicuous place and was so found, in violation of section 2597 of the Chicago Code of 1911.”

The case was tried before the court and a jury and a verdict was rendered by the latter finding the defendant guilty and assessing his fine at ten dollars. Judgment was entered on the verdict, and this writ of error followed.

Section 2597 is included in article II of chapter 79 of the said Code. Article II is entitled “Public Automobiles for Passengers” and provides for the licensing of public automobiles. Sections 2588 and 2597 of said article (the only ones material to a consideration of this case) read as follows:

“2588. No automobile, autocar or other similar vehicle which shall stand or be kept upon any public cab and hack stand or upon any street or public way in the city, for employment, shall be used anywhere within the city for the carrying or conveying of persons for hire or reward unless such vehicle shall be licensed as hereinafter provided.”

“2597. There shall be fixed on the inside thereof and in a conspicuous place, in every vehicle licensed under the provisions of this article, in such manner that the same may be easily and conveniently read by any person riding therein, a card to be obtained from the city clerk, on which shall be printed the name of the owner and the number of the license of such vehicle, and also the whole of section 2613 relating to rates of fare, and the whole of sections 2605 and 2606 relating to the carriage of baggage, and lost baggage.”

The evidence shows that the defendant was employed by the Frank Parmelee Company; that said company was engaged in the business of operating automobiles for the conveyance of passengers in the city of Chicago; that on May 22, 1914, the defendant drove an automobile up to the Union Station in the city of Chicago, stopped in front of the station and took on two passengers; that two police officers stepped up and asked the defendant if he had a rate card as provided for in said section 2597; that the defendant replied that he had not; that the officers examined the automobile and found the same without such rate card; that one of the officers rode with the defendant until he deposited the passengers at their destination, and then arrested him; that the automobile driven by the defendant on the occasion in question was licensed under article II, chapter 79 of the Chicago Code. The defendant offered to prove that at the time the license in question was issued, the Parmelee Company notified the city that it would not be used; that the vehicle in question was covered by and in use under a license issued by the city to the

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Parmelee Company under section 2663, article VI, chapter 79 of the Chicago Code of 1911; "that neither the defendant nor the vehicle nor the Parmelee Company was engaged in the occupation, or use of the vehicle, covered by section 2597 of article II;" and that the automobile passenger business of the said company was licensed under and confined in its use to the business or occupation covered by said article VI. On objection by the city the court ruled that the offered evidence was incompetent and refused to admit the same.

The defendant requested the court to instruct the jury to find the defendant not guilty under the evidence. This motion was denied. The question as to the sufficiency of the evidence to sustain a verdict of guilty was also raised by the defendant in other ways, but we do not deem it necessary to refer specifically to these.

The defendant has assigned and argued a number of alleged errors, but in the view that we have taken of the case, it will only be necessary for us to notice one of these.

The defendant contends that the facts proved do not show a violation of section 2597. To quote from the defendant's brief:

"There is no evidence whatever in the case that the automobile in question at the time of the violation complained of, or at any other time, was in use for the purposes subject to the provisions of article 2, viz.—as defined in section 2588,—to 'stand or be kept upon any public cab and hack stand or upon any street or public way in the city, for employment.' And the prohibition of the ordinance is against such 'use' of vehicles without a license. * * * There is no evidence or ground of inference in the case that the vehicle was at the time alleged, or any other time, engaged in the occupation for which the license was issued, or to which the rate card regulation pertained;

and for this reason alone the jury should have been instructed to return a verdict for the defendant."

The prosecution does not claim that there is any evidence in the record tending to prove that the automobile in question was being used on the occasion in question, or had been used at any time since the issuance of the said license in the business of keeping, using or operating an automobile "which shall stand or be kept upon any public cab and hack stand, or upon any street or public way in the city for employment;" but it contends that, "having taken out a license under article II, it had the right to stand upon the public cab and hack stands, or upon the public street or ways for employment, and having that right it was subject to the obligations of the ordinance. * * * He had acquired this right and had engaged in the general occupation or line of business pursuant to their license; that is the operation of a public automobile, for the conveyance of passengers, and, having done so, he cannot now say that he is not using the license."

It seems idle to argue that merely because the defendant had obtained a license to engage in the business contemplated by section 2597 he would be guilty of a violation of said section, even though he did not actually follow the said business. No case has been cited by the city, nor are we aware of any authority, that supports such a doctrine. We are satisfied that section 2597, as well as all other "regulation sections" in article II apply only to persons who not only take out a license under the article, but who thereafter engage in the business covered by the license. In our judgment, the real question for us to decide in the present case is, does proof that the defendant obtained a license under the ordinance create a presumption that he actually engaged in the business covered by the ordinance? If it does not, it is clear that the city did not make out a prima facie case against the defendant.

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A license is a permission or privilege granted by the State, directly or indirectly through the medium of a municipality, to *perform certain acts or to carry on a certain business* which, if done without such license, would be illegal. *Wilkie v. City of Chicago*, 188 Ill. 444; *Metropolis Theater Co. v. City of Chicago*, 246 Ill. 20. The license in question did not create any contract between the city and the defendant, and the acceptance of the same by the defendant did not impose any obligation upon him to follow the business covered by the license. It would seem to logically follow from this, that, in the present case, there can be no presumption that the defendant actually engaged in the business covered by the license from the mere fact that he had taken out the license in question. While he had the clear right to use the vehicle in the business for which the license was issued, it does not follow, as a presumption of fact, that he exercised the right merely because he obtained the necessary legal permission to do so. *A fortiori*, it does not follow as a presumption of law. In the present proceeding, the possession of the license by the defendant does not any more tend to prove that the defendant was actually engaged in the business covered by the license than would the absence of a license tend to prove that he was not engaged in the said business, if the present proceeding were a prosecution for doing business without a license. The possession of a license or the want of it would not fix the status of the defendant in respect to the alleged business in either case.

It must also be remembered that, while it is true that the present prosecution is a civil suit, nevertheless, the action is in its nature penal, and it was incumbent upon the city to prove clearly that the defendant had violated the ordinance in question.

The defendant insists that 25 Cyc. 638, is authority for holding that it was incumbent upon the city, to sustain its case, to prove that the defendant was actually

following the occupation licensed. It will be found, however, upon an inspection of the text cited that the author is referring to criminal cases in which the defendant is charged with following a taxable occupation without a license. The city cites in support of its contention the case of *Kopper v. Willis*, 9 Daly (N. Y., 1881) 460. In that case an action was brought to recover from the defendant as an innkeeper the value of an overcoat belonging to the plaintiff, alleged to have been lost in the defendant's restaurant while the plaintiff was a patron therein, and the question was whether the defendant's place of business was an inn (subjecting him to the extraordinary liability imposed by the common law upon innkeepers) or only a restaurant. It appears that the defendant, under the New York law, could not obtain a license unless upon proof by affidavit to the board of commissions of excise that he kept an inn, and that an inn was necessary for the accommodations of travelers in the place where he kept it, and the evidence showed that the defendant had made an affidavit, for the purpose of securing a license, to the effect that he kept an inn, and the court held that proof of the issuance of the license, coupled with the affidavit of the defendant connected therewith, was sufficient to establish the material fact that the defendant kept an inn. In our judgment this case tends to support the contention of the defendant.

After a careful consideration of the question, we have reached the conclusion that section 2597, upon which the prosecution in this case was predicated, only applies to cases in which a person not only takes out a license under the ordinance, but actually, thereafter, engages in the business covered by the ordinance, and, further, that the city did not prove the charge made in the information. We are also of the opinion that the evidence offered by the defendant, to which we have heretofore referred, was competent and should have been admitted.

The People v. City of Chicago, 195 Ill. App. 48.

The judgment of the Municipal Court of Chicago will be reversed and the case will be remanded for a new trial.

Reversed and remanded.

The People of the State of Illinois ex rel. Albert G. Hickland, Appellee, v. City of Chicago, et al., Appellants.

Gen. No. 20,699. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Petition for mandamus by Albert G. Hickland to compel the City of Chicago, Carter H. Harrison, John L. McWeeney, Harmon M. Campbell, Elton Lower and John J. Flynn to reinstate the petitioner to the office or position of patrolman of the police department and to certify his reinstatement as required by law. The trial court overruled a general demurrer of the respondents to the petition, as amended, and the respondents electing to stand by their demurrer, it was ordered that writ of mandamus issue as prayed and judgment for costs was rendered against the respondents, who brought this appeal.

JOHN W. BECKWITH, for appellants; JOHN E. FOSTER, of counsel.

No appearance for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The People v. City of Chicago, 195 Ill. App. 48.

Abstract of the Decision.

1. **MANDAMUS, § 129***—*what petition must aver.* A writ of mandamus should not be issued in any case unless the party applying for the writ shows a clear right to it, and a clear legal duty on the part of the respondent or respondents to perform the act sought to be enforced.

2. **EVIDENCE, § 10***—*what will be judicially noticed.* State courts of general jurisdiction will not take judicial notice of municipal ordinances, and they must be pleaded and proved.

3. **MANDAMUS, § 138***—*when averment as to public office necessary.* A petition for mandamus to compel the reinstatement of petitioner to the office of patrolman should specifically plead the ordinance creating such office, as there is no statute creating the office of police patrolman.

4. **MUNICIPAL CORPORATIONS, § 131***—*what is nature of office of policeman.* The office of policeman or police patrolman was unknown to the common law.

5. **MANDAMUS, § 139***—*what petition for reinstatement to office must show.* A petition for mandamus to compel the reinstatement of petitioner to the office of police patrolman must allege that he is an officer *de jure*, and allegations that such petitioner was tried by the Civil Service Board under the title of police patrolman, and that appropriations for his salary were made by the city council, merely tend to show that he was an officer *de facto*.

6. **MANDAMUS, § 139***—*when petition for reinstatement to office is insufficient.* A petition for mandamus to compel the reinstatement of petitioner to the office of police patrolman is insufficient when the allegations as to an ordinance creating the office of police patrolman are mere conclusions of the pleader and not statements of facts, from which the court can determine whether or not the position was created by ordinance.

7. **MANDAMUS, § 139***—*when petition is insufficient as showing unwarranted discharge of officer.* A petition for mandamus to compel the reinstatement of petitioner to the office of police patrolman, alleging that there was no evidence to support the findings of the Civil Service Commission in discharging him, and that petitioner was not present when the finding was made and had no opportunity to object to the same, does not show that the action of the commission was not warranted under the law, as the allegations as to evidence not justifying the finding of guilty are immaterial in determining the sufficiency of the petition, and the law did not require the presence of petitioner when the finding was made.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

North West State Bank v. Alter, 195 Ill. App. 50.

**North West State Bank, Appellee, v. Jacob Alter,
Appellant.**

Gen. No. 20,766. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. Rehearing denied October 16, 1915.

Statement of the Case.

Action of the first class in the Municipal Court of Chicago, brought by North West State Bank, a corporation, against Jacob Alter to recover on a certain promissory note in the principal sum of \$1,172.08, with interest thereon at six per cent. per annum, executed by the defendant and made payable to one Alfred Anderson. The case was tried before the court and a jury, and at the close of all the evidence the court directed a verdict in favor of the plaintiff for \$1,231.56. Judgment was entered on the verdict, and this appeal followed.

BLUM, WOLFSOHN & BLUM, for appellant.

WALTER H. ECKERT, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 240***—*when bank does not become innocent purchaser.* A bank does not become an innocent purchaser of a negotiable note so as to entitle it to protection against infirmities of the paper by merely discounting the same for a person not indebted to it and crediting him with the proceeds by way of deposit, as such deposit so long as it is not withdrawn is subject to equities of prior parties.

2. **BILLS AND NOTES, § 391***—*what makes prima facie case as to purchase of note in good faith.* The introduction in evidence of notes sued upon, indorsed in blank by the payee, is prima facie evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that the plaintiff has acquired them in good faith, for value, in the usual course of business before maturity and without notice of defenses, and such proof cannot be overcome by merely showing that the original transaction between the plaintiff and the payee did not of itself amount to a purchase of the notes.

3. **BILLS AND NOTES, § 412***—*what person must show to prove that bank is not innocent purchaser.* Defendants to a suit on a note brought by an indorsee bank, in order to sustain their claim that the bank is not entitled to protection as an innocent purchaser, must show not only that the bank merely credited the proceeds of the discounted note by way of deposit in favor of the payee and that the payee was not then indebted to the bank, but must also prove that the amount due upon such deposit, if any, had not been drawn out at the time of the trial, there being no claim of an earlier notice to the bank of such defense.

The People of the State of Illinois ex rel. G. Frank Lydston, Appellee, v. Maclay Hoyne, State's Attorney, Appellant.

Gen. No. 20,799. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Suit by the People of the State of Illinois on the relation of G. Frank Lydston against Maclay Hoyne, State's Attorney, seeking to compel the defendant, by mandamus, to sign a petition as State's Attorney, for leave to file an information in the nature of a quo warranto. The petition alleged, in substance, that certain persons, therein named, were unlawfully elected and acting as trustees for the American Medical Association, an Illinois corporation, not for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Hoyne, 195 Ill. App. 51.

profit. A general demurrer to the petition, interposed by the defendant, was sustained by the Circuit Court, whereupon the petitioner elected to stand by his petition and appealed to this court. This court (*People ex rel. Lydston v. Hoyne*, 182 Ill. App. 42) held that the Circuit Court erred in sustaining the demurrer to the petition for mandamus and reversed the judgment of that court and remanded the cause. Thereafter, this court, *by stipulation of the parties*, set aside the judgment it had entered, overruled the demurrer and entered a final judgment awarding a peremptory writ of mandamus, commanding the defendant, the State's Attorney of Cook county, to sign the said information in accordance with the prayer of the petition. Thereafter an appeal was taken to the Supreme Court and that court (*People ex rel. Lydston v. Hoyne*, 262 Ill. 82) held that this court had no jurisdiction, notwithstanding the stipulation of the parties, to enter a judgment overruling the demurrer and awarding the writ, and the judgment of this court was reversed and the cause remanded to this court with directions to enter a judgment in accordance with the one originally entered by this court. Thereafter this court remanded the cause to the Circuit Court and thereafter that court, in obedience to the judgment of this court, overruled defendant's demurrer. The latter elected to stand by his demurrer, and a final judgment was entered awarding a peremptory writ of mandamus commanding the defendant to sign the information in accordance with the prayer of the petition for mandamus. This appeal followed.

FREDERICK Z. MARX, for appellant.

STEDMAN & SOELKE, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The People v. Holtzman, 195 Ill. App. 53.

Abstract of the Decision.

APPEAL AND ERROR, § 1725*—*when former appeal binding.* Where a subsequent appeal presents the same suit, with the same parties thereto and with the same question involved as was passed upon and decided in the former appeal, the former adjudication is conclusive upon the parties.

The People of the State of Illinois, Defendant in Error, v. Ben Holtzman, Plaintiff in Error.

Gen. No. 20,787. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. Rehearing allowed and additional opinion filed December 8, 1915.

Statement of the Case.

Information by the People of the State of Illinois, filed in the Municipal Court of Chicago, in which it was charged that defendant, Ben Holtzman, "on the 23rd day of March, A. D. 1914, at the City of Chicago, aforesaid, did knowingly and fraudulently make a false representation in writing signed by him concerning his respectability, wealth, mercantile correspondence and connections, assets and liabilities and fraudulently obtained thereon credit and divers sums of money, to-wit: Eleven Hundred (\$1,100.00) Dollars from the Michigan Avenue Trust Company, a corporation, contrary to the form of the Statute," etc. Such information was founded on section 97 of the Criminal Code (J. & A. ¶ 3654), as to obtaining credit by false pretenses. The case was tried before the court and a jury and verdict was returned finding the defendant guilty. Judgment was entered on the verdict and the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Holtzman, 195 Ill. App. 53.

defendant was sentenced to confinement in the county jail for a period of thirty days and to pay a fine of \$500. This writ of error followed.

A rehearing having been allowed, the court, on the rehearing, rendered a judgment adhering to the decision on the questions raised on the hearing and passing upon the additional questions concerning the sufficiency of the indictment which were raised on the petition for a rehearing.

O. J. C. WRAY, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. CRIMINAL LAW, § 245*—*what may be considered in determining criminal intent.* In determining the question of criminal intent, the jury are not bound to accept the testimony of the defendant in reference thereto, but they may consider all the facts and circumstances connected with the case.

2. CRIMINAL LAW, § 520*—*when verdict will not be set aside.* On appeal in a criminal case, where it appears that a prima facie case was established against the defendant, and there were no errors of law, the verdict of the jury will not be set aside unless from all the evidence there is a reasonable doubt of the defendant's guilt.

3. FALSE PRETENSES, § 39*—*when verdict of guilty will be set aside.* Evidence held to show that a verdict of guilty of obtaining money by means of false representations as to assets or liabilities made to obtain credit was justified.

ON REHEARING.

1. CRIMINAL LAW, § 491*—*when question may be first raised on petition for rehearing.* In a criminal case, the objection that the information on which defendant was convicted is fatally defective may be raised for the first time on a petition for rehearing.

2. INDICTMENT AND INFORMATION, § 22*—*when sufficient.* An indictment or information is sufficient if the defendant is notified thereby of the charge which he is to meet, so that he may make his

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Buendert v. Bostrom et al., 195 Ill. App. 55.

defense, and if convicted or acquitted thereof may be able to plead former jeopardy to another charge for the same offense.

3. INDICTMENT AND INFORMATION, § 41*—*when use of language of statute not essential.* In an indictment or information it is not necessary to use the very words of the statute creating the offense, but it is sufficient to use words conveying the same meaning, or which are equivalent to the words of the statute, or words which in their signification are inclusive of the statutory words, or which in common acceptation are of the same or similar import, or which substantially follow the statutory words and state them with substantial accuracy within a reasonable intendment.

4. INDICTMENT AND INFORMATION, § 23*—*when implied allegation sufficient.* Whatever is included in or necessarily implied from an express allegation need not be otherwise averred.

5. INDICTMENT AND INFORMATION, § 30*—*when mode of commission of offense sufficiently described.* An information averring that defendant by means of false representations "*fraudulently* obtained * * * credit and divers sums of money, to wit: Eleven Hundred (\$1,100.00) Dollars from the Michigan Avenue Trust Company," *held* not fatally defective in that such averment did not sufficiently enable defendant to understand the nature of the charge made against him, such averment being in legal effect equivalent to a direct charge that such trust company was defrauded by means of such representations.

Louis Buendert, Plaintiff in Error, v. Charles Bostrom et al., trading as Henry E. Strassheim & Company, Defendants in Error.

Gen. No. 20,790. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH R. STEWART, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action of the fourth class in the Municipal Court of Chicago by Louis Buendert against Charles Bostrom,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Buendert v. Bostrom et al., 195 Ill. App. 55.

Henry E. Strassheim and Adolph F. Boericke, trading as Henry E. Strassheim & Company. The plaintiff's original statement of claim and the first and second more specific statements of claim, having been stricken from the files on motion of the defendants, the plaintiff, pursuant to the order of the court, filed his third more specific statement of claim. On motion of the defendants, this last-mentioned statement of claim was ordered stricken from the files and the suit was dismissed at the plaintiff's costs. This writ of error followed.

JARBELL & McNEIL, for plaintiff in error.

WILLIAM G. WISE and ROGER FAHERTY, for defendants in error.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 13*—*when statement of claim erroneously stricken from files.* Statement of claim in an action to recover money paid on a contract for the purchase of realty on the ground that such payment was induced by the fraudulent representations of the defendants as to the dimensions of the property covered by the contract, *held* sufficient to present a claim for fraud and deceit, and hence the striking of the statement from the files on the theory that the plaintiff was attempting to vary a written contract by antecedent representations was erroneous, since the plaintiff's action was not based upon the contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fleck v. Weipert, 195 Ill. App. 57.

Frederick Fleck, Administrator, Appellee, v. Joseph Weipert, Appellant.

Gen. No. 20,801. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Suit by Frederick Fleck, administrator *de bonis non* of the estate of Marie Weipert, deceased, against Joseph Weipert to recover the proceeds of a sale of a certain saloon business located at 628 Wells street, Chicago. The defendant was the reputed husband of said Marie Weipert, and they lived together as husband and wife for a number of years, and upon the death of the said Marie Weipert, October 7, 1912, the defendant "as surviving husband of the deceased" was appointed administrator of her estate. The defendant operated a saloon and restaurant at 628 Wells street, Chicago; also a saloon at Lincoln and Wrightwood avenues, Chicago. The defendant resigned as administrator of the estate of said Marie Weipert, deceased, November 27, 1912, and the plaintiff, a brother of the deceased, was appointed administrator *de bonis non* of said estate on December 2, 1912. During the time that the defendant was acting as administrator of the said estate, he sold the business at 628 Wells street for \$4,200. The case was tried before the court and a jury, and the issues were found for the plaintiff and the damages were assessed at \$4,200. Judgment was entered on the finding and this appeal followed.

MICHAEL KOCH, for appellant; DELBERT A. CLITHERO, of counsel.

BRADLEY, HARPER & EHEIM, for appellee.

Kennedy v. City of Chicago, 195 Ill. App. 58.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 93*—*when instruction as to credibility of witnesses erroneous.* An instruction which in effect authorizes the impeachment of a witness as to an immaterial matter in his testimony, in reference to which he has made different and contradicting statements in former occasions, is erroneous.

2. WITNESSES, § 275*—*what is effect of contradictory statements of witness.* Proof of different and contradictory statements of a witness as to a material matter made on former occasions is merely evidence tending to impeach such witness, to be considered by the jury in estimating the weight of the testimony.

3. WITNESSES, § 282*—*when testimony of witness may be disregarded.* If a jury believe that a witness has wilfully sworn falsely to a material matter, or that he has been successfully impeached, they may disregard his entire uncorroborated testimony—otherwise not.

4. HUSBAND AND WIFE, § 210*—*when instruction as to effect of separation erroneous.* An instruction stating in effect that if a woman married a man in good faith and afterwards learned that he had another wife living, and they agreed to separate, such agreement was sufficient consideration to support a transfer of property from such man to the woman, is erroneous, since it was the duty of the woman on learning of the former marriage to cease living in adultery, and the agreement to separate did not extinguish any claim or right which the woman might have against the man.

Thomas Kennedy by Peter Koenen, Appellee, v. City of Chicago, Appellant.

Gen. No. 20,849. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kennedy v. City of Chicago, 195 Ill. App. 58.

Statement of the Case.

Action on the case, brought in the Superior Court of Cook county by Thomas Kennedy, a minor, by his next friend, Peter Koenen, against the City of Chicago, to recover damages alleged to have been sustained by the plaintiff by reason of a certain accident to the plaintiff on August 26, 1915. The accident occurred at a point where Larrabee street crosses the Chicago, Milwaukee & St. Paul Railroad tracks in the city of Chicago. The plaintiff, a boy nine years old, was run over by a train passing along said tracks, and one of his legs was so badly injured that it became necessary to amputate the same.

The case was tried before the court and a jury, and a verdict was returned finding the defendant guilty and assessing the plaintiff's damages at \$7,500. Upon the plaintiff's entering a remittitur for \$2,500, the court entered judgment for \$5,000, and this appeal followed.

JOHN W. BECKWITH and N. L. PIOTROWSKI, for appellant; DAVID R. LEVY, of counsel.

JAMES V. CUNNINGHAM, for appellee; JOHN T. MURRAY, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1396***—*when verdict will not be set aside on appeal.* A verdict based on conflicting evidence will not be set aside on appeal unless clearly and manifestly against the weight of the evidence.

2. **NEGLIGENCE, § 189***—*when question of contributory negligence is for court.* The question as to whether or not a person is guilty of contributory negligence is generally one of fact for the jury, and it only becomes a question of law when the evidence so clearly fails

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Terrault v. Chicago City Railway Co., 195 Ill. App. 60.

to establish due care that all reasonable minds would reach the conclusion that the person was guilty of contributory negligence.

3. MUNICIPAL CORPORATIONS, § 1100*—*when instruction sufficient though incomplete.* In an action for injuries caused by the defective condition of a sidewalk, an instruction allowing the jury to consider the condition of such sidewalk, and ignoring the question of notice to the city of such condition, is not erroneous when the question of notice is fully covered by other instructions given.

4. APPEAL AND ERROR, § 438*—*when question of variance will not be considered on appeal.* The question of alleged variance between the allegations and proof cannot be raised for the first time on appeal.

Magdeline Terrault, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 20,867. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

Statement of the Case.

Action on the case by Magdaline Terrault against the Chicago City Railway Company, in the Superior Court of Cook county, to recover damages for personal injuries claimed to have been sustained by the plaintiff through the negligence of the defendant. The action was originally brought against the Chicago Railways Company. Afterwards the Chicago City Railway Company was made an additional defendant to the suit. The plaintiff, in her declaration, alleged that while she was in the act of boarding one of the cars of the defendants for the purpose of becoming a passenger, and while she was in the exercise of ordinary care for her own safety, the defendants, through their

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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servants, carelessly and negligently caused the car to be suddenly and violently started, and she was thereby thrown with great force and violence from and off the car to the ground, and that she suffered a miscarriage and was otherwise greatly bruised and injured. Both defendants pleaded the general issue. The case was tried before a court and a jury, and during the progress of the trial the action was discontinued as to the Chicago Railways Company.. A verdict was returned by the jury finding the defendant guilty and assessing the plaintiff's damages at \$3,500. A motion for a new trial was overruled, judgment was entered on the verdict and this appeal followed.

JOHN E. KEHOE and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

E. LESLIE COLE and C. HELMER JOHNSON, for appellee; GUEBIN & BARRETT, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 210*—*what cross-examination is improper.* Cross-examination of a witness which has the purpose of degrading and humiliating such witness, and prejudicing the jury against her testimony, is improper.

2. APPEAL AND ERROR, § 1772*—*when judgment will be reversed for improper cross-examination.* On appeal in an action for personal injuries, where it appears that the case is a close one on the merits, and the record shows that improper cross-examination of a witness tended to prejudice the defendant's rights, the judgment for the plaintiff will be reversed and a new trial ordered.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Karcher v. Tyng & Co. et al., 195 Ill. App. 62.

Philip Karcher, Appellant, v. Dudley A. Tyng & Company et al., Appellees.

Gen. No. 20,887. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PERRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action on the case to recover damages for alleged fraud and deceit by Philip Karcher against Dudley A. Tyng & Company, a corporation, C. W. George and William C. Jacklin. The declaration consisted of two counts. The first count, in substance, charged the defendants with falsely, fraudulently and knowingly making certain false and fraudulent representations to the plaintiff as to the condition of the La Touriste Manufacturing Company; that the plaintiff relied upon such representations and as a result thereof suffered a loss. The second count was substantially the same as the first, save that it also charged that the defendants entered into a wilful and malicious conspiracy, agreement and undertaking to cheat and defraud the plaintiff. To the declaration, all the defendants filed pleas of the general issue.

The case was tried before the court and a jury, and when the plaintiff rested, the trial court, of his own motion, directed a verdict for the defendants. This appeal followed.

FRED W. REINHARDT, for appellant.

CHARLES A. NOWAK and **W. R. HAUZE**, for appellees.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Dressler v. Van Vlissingen, 195 Ill. App. 63.

Abstract of the Decision.

TRIAL, § 195*—*when peremptory instruction erroneous.* A peremptory instruction should not be given when there is evidence introduced by the plaintiff tending to prove the material allegations of the declaration.

Charles Dressler, Administrator, Appellant, v. James H. Van Vlissingen, Appellee.

Gen. No. 20,932. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Action in assumpsit in the Superior Court of Cook county by Charles Dressler, administrator of the estate of Fredericka Dressler, deceased, against James H. Van Vlissingen to recover on a promissory note executed by the defendant at Chicago, dated December 1, 1903, to the order of Fredericka Dressler, for the sum of \$1,000, with interest at six per cent. per annum. It appeared that the defendant had been discharged in bankruptcy, but the plaintiff claimed that he had expressly promised to pay the debt after such discharge, and there was evidence that the defendant had paid \$50 on the note.

The case was tried by the court without a jury, and the issues were found in favor of the defendant. Judgment was entered upon the finding and this appeal followed.

OSSIAN CAMERON and FRED C. CHURCHILL, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Huggins v. Gottschalk et al., 195 Ill. App. 64.

FREDEBICK R. DE YOUNG, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. **BANKRUPTCY, § 81***—*what promise is necessary to revive a debt discharged in bankruptcy.* A discharge in bankruptcy releases a debt of the bankrupt arising out of a note, and to revive the same the promise of the debtor to pay the note must be clear, distinct and unequivocal, and without such clear and express promise neither payment of interest, part payment of principal, nor declaration of intention to pay will suffice to revive the same.

2. **BANKRUPTCY, § 85***—*when proof of new promise to pay debt discharged in bankruptcy is insufficient.* Evidence held not to show a clear and unequivocal promise to pay a note discharged in bankruptcy.

**Sara G. Huggins, Appellee, v. Lilly Gottschalk et al.
Albert Wesley Gottschalk, Appellant.**

Gen. No. 20,942. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JOHN M. CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Bill to foreclose a trust deed covering certain real estate in Cook county, filed in the Superior Court by Sara G. Huggins. The trust deed was executed by Lilly Gottschalk, and was given to secure the payment of certain promissory notes. All of the notes were signed by said Lilly Gottschalk and were made payable to herself, and were indorsed by her and Albert Wesley Gottschalk. At the time of the filing of the bill, some

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of the notes were owned by the complainant. A decree was entered finding, *inter alia*, that there was due to the complainant the sum of \$641.47, with interest thereon from December 27, 1912, and also the sum of \$75 as reasonable solicitor's fees, and a sale of the real estate was ordered, unless such sums, together with the costs of the suit, were paid within ten days. The decree further provided that "after the coming in and the confirmation of the master's report of sale in case any deficiency is shown in the amount due to the complainant, Sara G. Huggins, she shall be entitled to execution against the defendant, Lilly Gottschalk and Albert Wesley Gottschalk, personally liable therefor." This appeal is prosecuted to reverse said decree, and the sole appellant is Albert Wesley Gottschalk.

ALBERT WESLEY GOTTSCHALK, *pro se*.

SONNENSCHN, BERKSON & FISHELL, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 308*—*what decision not reviewable on appeal.* A conditional deficiency decree not being final nor appealable, the propriety of entering such a decree against the indorser of mortgage notes is not reviewable.

John F. Doran et al., Appellees, v. Beatrice M. Graham,
Appellant.

Gen. Nos. 21,217, 21,442.

1. DEDICATION, § 25*—*when plat sufficient.* A plat containing building line restrictions held to substantially comply with the statutes (Rev. Stat., ch. 109, and ch. 115, sec. 13, J. & A. §§ 8517-8526, 9110).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. DEDICATION, § 33*—*when common-law dedication exists.* Where property is subdivided and a plat made thereof which does not comply in every respect with the statute, but which is recorded, there is a common-law dedication, and if the owner of lots designated on such plat conveys according to the description contained in the plat and by reference thereto, he adopts the plat with all its dedications, and he and those who succeed to his title are estopped to deny such dedication.

3. DEEDS, § 140*—*when restriction as to use of property is created.* Where a deed refers to a plat or subdivision, such plat and all the particulars shown thereon are as much a part of the deed as though they were recited in it.

4. FRAUDS, STATUTE OF, § 29*—*when statute does not apply.* The Statute of Frauds (Rev. Stat., ch. 59, sec. 2, J. & A. ¶ 5868), does not apply where a grantee of property seeks to avoid building restrictions contained in the plat of the property purchased, on the ground that such plat was not signed by the grantee.

5. DEEDS, § 144*—*when restrictions in deed are binding.* If a deed refers to a plat that contains building line restrictions, such restrictions are binding on the grantee, though the latter does not sign the plat or the deed, and when the owner of land sells the same, he may insert in the deed of conveyance such terms and conditions as he pleases touching the mode of enjoyment and use of the land, and if they are not objectionable in law, they will be binding on the grantee who accepts such deed, although the latter does not sign the deed.

6. DEDICATION, § 78*—*what building restrictions may be inserted in plat.* The owner of property platting the same may insert in the plat binding restrictions as to the character of structures which may be erected on the property.

7. DEEDS, § 145*—*what is effect of deed containing restrictions.* Where a deed refers to a recorded plat containing building line restrictions, such restrictions, if they are not objectionable in law, are binding on the grantee who accepts the deed.

8. INJUNCTION, § 202*—*when demurrer necessary.* In the absence of a demurrer, defendant has the right to challenge a bill for an injunction in matters of substance only.

9. INJUNCTION, § 192*—*when writ will issue.* A writ of injunction preventing the erection of a flat or apartment building, held warranted by a bill showing that such building was prohibited by the plat, which was binding on defendants as grantees of property contained in such plat.

10. INJUNCTION, § 206*—*what evidence is inadmissible.* In a suit to enjoin the erection of flat buildings contrary to restrictions imposed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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upon the grantee of the land, certain building ordinances of the city, defining "flat buildings" and "apartment buildings," did not apply.

11. INJUNCTION, § 205*—*when finding of chancellor is justified by evidence.* In a suit to enjoin the erection of flat buildings contrary to the restrictions imposed upon a grantee of land, a finding of the chancellor that the buildings to be erected were flats or apartments was justified by the evidence, although the plans were designed to conceal the real character of the structure to be erected.

12. INJUNCTION, § 251*—*when enjoined party cannot complain of subsequent order broader in scope.* Where a grantee of land, enjoined from erecting a flat or apartment building thereon, proceeded with the erection of such building in accordance with plans substantially the same as those mentioned in the writ of injunction, she could not complain of a subsequent order of the chancellor enjoining the defendant from using the partial structure as the basis for any work of construction, since such order was necessary to protect the rights of complainants and was brought about by the defendant's conduct.

13. BUILDING RESTRICTIONS AND REGULATIONS, § 3*—*when restriction not waived.* Evidence held not to show waiver of building restrictions prohibiting the erection of flat buildings in a certain subdivision.

Appeals from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the December term, 1914. Affirmed. Opinion filed October 6, 1915.

HEBEL & HAFT, for appellant.

HUGH O'NEILL, P. H. O'DONNELL and THOMAS J. LAWLESS, for appellees.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

These two appeals have been consolidated for hearing in this court by written stipulation of the parties.

On November 24, 1914, the appellees, hereinafter called the complainants, filed a bill for an injunction in the Superior Court of Cook county against the appellant, hereinafter called the defendant, to enforce certain alleged building restrictions, contained in a certain plat of real estate located in Cook county, Illinois, and known as Albion Subdivision. The bill and the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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amendment thereto, filed December 1, 1914, alleged, *inter alia*, that each of the complainants was the owner of one or more lots in the said subdivision and that the defendant, Beatrice M. Graham, was the owner of Lot 7 in said subdivision; that Bernard F. Weber, the owner of the said land, afterwards known as Albion Subdivision, caused the same to be surveyed, platted and subdivided, and afterwards, on October 19, 1906, caused said plat to be placed of record under the name and style of Albion Subdivision; that the certificate of the owner on said plat is in words and figures as follows:

“I, Bernard F. Weber, owner, * * * do hereby certify that I have caused the said premises to be platted and resubdivided as shown by the above plat into lots with building lines and restrictions as shown thereon and that all the deeds or other conveyances of any part of said lands and premises hereafter to be made, referring to any map or plat of the premises above platted or any part thereof, shall have reference to the above plat or map and to the future subdivision of the same, that all the spaces between the front lines of said lots and the building line twenty-five (25) feet distant from such front line shall be kept free from buildings of any kind or nature and no buildings of any kind or description or appurtenances thereto shall ever be erected between said building line and the front line of each and every lot heretofore mentioned. *That no flat buildings or apartment buildings shall be erected on any of the aforesaid lots within the limits of the above described subdivision; that only one residence building shall be erected on every thirty-three and one-third (33-1/3) front feet of ground and no residence shall be erected on any part of said premises of a less value or cost than five thousand dollars (\$5,000), but this restriction shall not bar the erection of a barn or outhouse in the rear of any residence.*

“Given under my hand and seal this 12th day of October, A. D. 1906.

“BERNARD F. WEBER, Owner.”

That thereafter the complainants and the defendant, Beatrice M. Graham, derived fee-simple title by deed from Bernard F. Weber, the owner; that complainants and the defendant took title to said lots subject to the covenants, conditions and restrictions appearing in said plat and the certificate thereto; that the lots in said subdivision were intended to be and were put on the market and sold as residence lots; that the lots of the complainants and the defendant were afterwards conveyed to the complainants and the defendant with the intention and purpose that the same should be and remain residence lots, upon which no flat buildings or apartment buildings should be erected; that twenty of the lots affected by the restrictions appearing in the certificate of the plat have been purchased and improved by the owners; that in each and every instance all the restrictions, covenants and conditions mentioned in said plat and the certificate thereto have been observed and adhered to; that relying on the validity of the said restrictions, eleven of the complainants have erected private homes upon their respective lots; that in violation of the said restrictions the defendant intends to construct a flat building or apartment building on Lot 7 in said subdivision, and with that end in view is now engaged in excavating for the footings and foundations of the said building; that the said proposed building, when finished, would be unsightly and would spoil the appearance of said subdivision and utterly defeat the purpose for which it was made; that if said building were erected as proposed, it would greatly depreciate the market value of the property of the complainants, and would entail irreparable loss and damage to the complainants. The bill prayed that the defendant be enjoined and restrained from erecting the flat or apartment building, or a building or structure which is apparently designed like a residence but is intended to be used as a flat building or an apartment building. On motion of the complainants, the

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chancellor granted a writ of injunction against the defendant in accordance with the prayer of the bill. The defendant appealed from this order, entered December 1, 1914, to this court, General Number 21,217.

On December 5, 1914, the complainants filed a petition alleging that the defendant was violating the order of December 1, 1914, and praying for a rule on the defendant and one Strobehn to show cause why they should not be attached for contempt of court, for violating the said order. The defendant filed an answer to the petition, and thereafter testimony was taken by the chancellor in the matter of the said petition, and the chancellor thereupon entered an order enjoining and restraining the defendant from erecting a flat or apartment building on said Lot 7, "and from using that portion of the building which has been erected by the said defendant, Beatrice M. Graham, in violation of the injunction of this court as aforesaid in the erection or as a basis for the erection of any building upon said premises, until this court in chancery sitting shall make other order to the contrary." The defendant appealed from this order to this court, General Number 21,442.

The defendant contends that in many essential particulars the plat in question does not comply with the law (chapter 109, Hurd's Rev. Stat., J. & A. §§ 8517-8526, and section 13, ch. 115, Hurd's Rev. Stat., J. & A. § 9110) and that it is therefore without any binding effect on her. Many of the objections made to the plat by counsel are of the most technical and hypercritical kind. After a careful consideration of all of them we are satisfied that the plat is in substantial compliance with the statutes. But, even if it be conceded that it does not comply in every respect with the statutes, the defendant, under the facts of this case, is estopped to deny that the plat is binding upon her. "Where property is subdivided and a plat made thereof which does not comply in every respect with the statute, but which

is recorded, there is a common-law dedication, and if the owner of lots designated on such plat conveys according to the description contained in the plat, and by reference thereto, he adopts the plat with all its dedications, and he, and those who succeed to his title, are estopped to deny such dedication.” *Marshall v. Lynch*, 256 Ill. 522-526; *Ingraham v. Brown*, 231 Ill. 256. Many other cases to the same effect might be cited. It is clear that the facts of the present case bring it within the above rule. It must be also noted that not only did Weber convey the lots on the plat according to the descriptions contained in the plat, and by reference thereto, but in the deed from Weber to the defendant the following is found: “Subject to taxes and special assessments subsequent to the year A. D. 1913, *also to buildings and building line restrictions of record.*” It is the law in this State that where a deed refers to a plat or subdivision, the plat and all the particulars shown thereon are as much a part of the deed as though they were recited in it. But in the present case, however, we find express reference made in the deed to restrictions appearing of record. The alleged building restrictions that the defendant now seeks to avoid were, at the time she accepted the deed from Weber, of record, and were a part of the plat that formed a link in the chain of defendant’s title, and it would be highly inequitable, under all the facts of this case, to permit the defendant to assert that the plat was without any binding effect upon her.

The defendant contends that “the alleged restrictions are in violation of the Statute of Frauds (section 2, ch. 59, Hurd’s Rev. Stat., J. & A. ¶5868), and is therefore void.” The defendant argues that the declaration of restrictions, made by Weber in the plat, is in violation of the Statute of Frauds because she did not sign the same. We fail to see what possible bearing the Statute of Frauds has upon the question as to whether or not the alleged restrictions are binding upon the de-

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fendant. This is not an action brought to charge any person upon any contract for the sale of lands, etc. Moreover, if a deed refers to a plat that contains building line restrictions, the restrictions are binding on the grantee, although the latter does not sign the plat, or the deed, and, when the owner of land sells the same, he may insert in the deed of conveyance such terms and conditions as he pleases, touching the mode of enjoyment and use of the land, and if they are not objectionable in law, they will be binding on the grantee, who accepts such deed, although the latter does not sign the deed. It is unnecessary to cite authorities in support of these well-known propositions of law. It would seem to be clear that there is no merit in the present contention of the defendant.

The defendant contends that Weber had no right, under the statute, to insert the alleged restrictions in the plat, and that they are, therefore, not binding upon the defendant. No authority is cited that sustains this contention. It must be conceded, however, that there is apparently but little law, *pro* or *con*, on the subject. In the well-known case of *Moulton v. Perry*, 2 Ill. Cir. Ct. 510, Judge Tuley, a very able and experienced chancellor, held contrary to the present contention of the defendant. Where a deed refers to a recorded plat that contains building line restrictions, the restrictions, if they are not objectionable in law, are binding on the grantee, who accepts the deed, and there would, therefore, seem to be no good reason, in principle, why the owner cannot create binding building restrictions of the kind in question in this case by making such restrictions a part of the plat, as was done by Weber in the present instance. The plat was made and recorded by the owner of the property and all the lots designated thereon were sold and conveyed by reference to the plat, and the defendant's deed, in addition, contained the express provision that the property was sold "subject to taxes * * * also to buildings and

building line restrictions of record.” In a court of equity, at least, Weber would not be allowed to escape the effect of the restrictions by asserting that he had no right to insert them in the plat, nor should the defendant, under the facts of this case, in a court of equity, be heard to say that the said restrictions are not binding upon her because Weber had no right to insert them in the plat.

The defendant contends that “the bill and alleged amendment thereto do not state sufficient facts to warrant the order of December 1, 1914.” In the absence of a demurrer, the defendant has the right to challenge the bill in matters of substance only. We have carefully read the bill and the amendment to the same, and we think that it did state sufficient facts to warrant the said order. In this connection it must be remembered that the defendant has, by stipulation, waived “the point that the injunction order entered in case No. 21,217 is invalid because perpetual in form.”

Over the objection of the complainants, the chancellor admitted in evidence, on motion of the defendant, certain building ordinances of the city of Chicago, and the defendant contends that the trial court, on the hearing upon the petition of the complainants, erred in not holding that the said ordinances controlled the meaning of the terms, “flat buildings” and “apartment buildings,” and that the trial court further erred in not holding, because of the said ordinances, that the building planned by the defendant, and of which the complainants were complaining, was the plan of a private residence and not a plan of a flat building or an apartment building. We have read the ordinances in question and we do not think that they have any application to the present case.

The defendant contends that the evidence clearly shows that the proposed building of the defendant is not a flat or apartment building. The chancellor decided the issue of fact, as to the character of the pro-

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posed building, against the defendant, and after a very careful examination of all the evidence bearing upon the question, we are satisfied that the chancellor was clearly justified in his finding. The building plans of the defendant were designed to conceal the real character of the structure to be erected, but a careful inspection and study of the said plans show that the proposed building is a flat or apartment building.

The defendant contends that it was error for the chancellor, in the order of January 14th, "to enjoin the defendant from using the partial structure on the lot in question for the erection of a private residence." The language of the order complained of is: "And from using that portion of the building which has been erected by the said defendant, Beatrice M. Graham, in violation of the injunction of this court as aforesaid, in the erection, or as the basis for the erection of any building upon said premises, until this court in chancery sitting shall make other order to the contrary." The chancellor also found in the said order that after the entry of the order of December 1, 1914, and after the defendant had knowledge of the same, and after service upon her of a writ of injunction, issued pursuant to said order, the defendant, through her agents, servants and employees, proceeded with the erection of the building in question, in accordance with plans that were substantially the same as were mentioned in the said writ of injunction, and the chancellor further found that the portion of the building, erected by the defendant, after notice and service of said injunction order of December 1, 1914, was erected in violation of the said order, and in violation of the rights of the complainants. It therefore appears that the chancellor was obliged to enter the order in question to protect the rights of the complainants. The defendant may have no right to use that portion of the building which was erected in violation of the injunction and in disregard of the rights of the com-

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plainants, and the chancellor may, on a final hearing of the case, decree that equity requires the tearing down of the portion of the building that has been thus erected. The defendant, by her conduct, brought about the order she now so seriously excepts to, and she is in no position, *under the present state of facts*, to complain of it. The order is a temporary one and can be modified if the situation in the future warrants such action.

The defendant next contends that if it be held that the building restrictions in question were valid, nevertheless, it appears from the record that the said restrictions have been waived by the complainants and Weber. We find this contention to be without merit.

Other contentions than those specifically referred to in this opinion have been raised by the defendant. These have all been carefully considered and found without merit.

The orders of the Superior Court of Cook county will therefore be affirmed.

Affirmed.

**A. M. Forbes Cartage Company, Defendant in Error,
v. Frankfort Marine, Accident and Plate Glass In-
surance Company of Frankfort-on-the-Main, Ger-
many, Plaintiff in Error.**

Gen. No. 20,471. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed October 6, 1915.

Statement of the Case.

Suit by A. M. Forbes Cartage Company, in the Municipal Court to recover from the Frankfort

Forbes Cartage Co. v. Frankfort Marine, etc., Ins. Co., 195 Ill. App. 75.

Marine, Accident and Plate Glass Insurance Company of Frankfort-on-the-Main, Germany, the amount of a judgment for personal injuries, with costs and attorney's fees, which the plaintiff was obliged to pay and which, it claimed, was covered by an insurance policy issued by the defendant. The plaintiff recovered a judgment for \$875.20, and this writ of error was sued out by the insurance company.

WILLIS G. SHOCKEY and MILLS & HOLLY, for plaintiff in error.

MATHER & HUTSON, for defendant in error; WILLIAM A. SHEEHAN, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 436*—*what is purpose of provision in indemnity insurance as to notice of accident.* The purpose of a provision in an insurance policy, insuring against loss or damage caused by vehicles of the assured, which requires the insured to give written notice to the insurer "immediately upon the occurrence of an accident * * * with the fullest information obtainable at the time," is to enable the insurer to ascertain all the facts and circumstances surrounding the accident while such facts are fresh in the memory of witnesses, so that such insurer may be prepared either to defend or to make settlement if any claim is thereafter made or suit brought for damages resulting from personal injuries.

2. INSURANCE, § 436*—*what is effect of failure to give notice as required by indemnity insurance policy.* Under an insurance policy insuring against loss or damage caused by vehicles of the assured, where an accident occurs and the insured as a result of its own investigation is satisfied that no claims for personal injuries can be successfully made, and such insured does not immediately notify the insurer of the accident as required by the policy, it elects to carry the risk itself and absolves the insurer from liability.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Friedman v. Western Union Tel. Co., 195 Ill. App. 77.

**L. S. Friedman, trading as L. S. Friedman & Company,
Defendant in Error, v. Western Union Telegraph
Company, Plaintiff in Error.**

Gen. No. 20,499.

1. **TELEGRAPHS AND TELEPHONES, § 20***—*what is duty of sender of telegram altered in transmission.* If an altered telegram is received and acted upon by the addressee before the discovery of the mistake, the sender of the telegram is thereafter only bound to take such steps to avoid loss as a reasonably prudent man would take to save himself, had the mistake or error been his own, and if he does this and a loss nevertheless ensues, the telegraph company is liable therefor.

2. **TELEGRAPHS AND TELEPHONES, § 31***—*when judgment for damages supported by evidence.* Where a sender of a telegram, as a result of a mistake in such message, was compelled to purchase a dozen suits and was able to sell only six of them, a judgment representing the difference in what he paid for the suits and what he was able to receive for them was supported by the evidence, which was uncontradicted.

3. **APPEAL AND ERROR, § 1709***—*when remittitur is proper.* In an action for damages caused by a mistake in a telegram, whereby the sender of the message was compelled to purchase a dozen suits, and he testified that he was only able to sell six of such suits, and that the remainder in his possession were worth about \$1 each, a judgment in his favor failing to allow credit for the value of such suits would be cured by a remittitur of six dollars.

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

WEST & ECKHART, for plaintiff in error.

MOSES, ROSENTHAL & KENNEDY, for defendant in error; HAMILTON MOSES and SIGMUND W. DAVID, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

The plaintiff, L. S. Friedman, recovered a judgment against the Western Union Telegraph Company, in a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tort action brought in the Municipal Court, to recover damages for the negligence of defendant in transmitting a telegraphic message from the plaintiff to J. M. Baruch of New York City. The defendant sued out this writ of error, and claims here that its negligence was not the proximate cause of the plaintiff's loss, and that, in any event, the damages awarded are excessive.

It appears from the evidence that the plaintiff is in the cloak and suit business in Chicago; that in October, 1912, he had purchased from Baruch, whose letter heads state that he is a "specialist in costumes and dresses," certain dresses, made of velvet and trimmed with fur, for \$20 each and had sold them for \$29.75 each; that on November 12, 1912, he wrote to Baruch that he would take a dozen more of the same kind of dresses if he could get them at the same price. To this letter Baruch replied, on November 13th, as follows:

"In regard to style No. 530 we note that you would like to have one dozen of these dresses if you would purchase them at \$20.00; this is out of the question as the regular price of this dress was \$35.00, but as it is late we will make you up this amount of dresses, delivery in one week at the special price of \$23.50, '*net*,' made of a combination of Velvet and Eponge. If this meets with your approval, kindly wire us day lettergram, which will make a difference of two days in delivery, also mention color and sizes."

On November 14th, the plaintiff sent a "night-letter" to Baruch, in which, among other things, the plaintiff said: "Cannot use dresses at twenty-three fifty." When the message was delivered to the defendant in New York, it read as follows: "*Can* use dresses at twenty-three fifty." Upon the faith of this altered telegram, Baruch shipped twelve dresses of the style mentioned to the plaintiff in Chicago. The plaintiff sent them back, saying that he had not ordered them. Baruch returned them to the plaintiff. It is a fair inference from the evidence that the plaintiff first learned of the mistake in the telegram when he received

the dresses from Baruch the second time. He testified that he then went to see the defendant and talked to "a man up there in the office" who said defendant "would take care of the matter." Some correspondence followed between the plaintiff and Baruch, who insisted on payment according to the message delivered to him, and finally on December 21, 1912, the plaintiff put the dresses on sale after notice to the defendant. Six of the dresses were thus sold for \$19.75 each, and according to the plaintiff's evidence, he was unable to sell the remainder at any price because the season for such dresses had passed. The amount of the judgment represents the difference between the amount paid to Baruch and the amount received by the plaintiff for the six dresses sold.

It is contended that the plaintiff was not bound to accept and pay for the goods shipped upon the strength of the altered telegram, and therefore, it is urged, if the plaintiff sustained any loss, such loss was proximately caused by his own voluntary act in paying for the dresses and not by the defendant's negligence in transmitting the telegram. This contention is based upon the theory that a telegraph company is not, as a matter of law, the agent of the sender of a telegram, but is an independent contractor, or "independent principal," for whose negligence the sender is not responsible.

Upon this question, there is a decided conflict of authority. One line of cases holds, without qualification, that a telegraph company is the agent of the party who employs it, and that the employer is bound by its acts, even though the message, as delivered, is different from the one sent. Among such cases are the following: *Western U. Tel. Co. v. Shotter*, 71 Ga. 760; *Sherrerd v. Western U. Tel. Co.*, 146 Wis. 197; *Ayer v. Western U. Tel. Co.*, 79 Mo. 493; and *Younker v. Western U. Tel. Co.*, 146 Iowa 499.

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Another line of cases, possibly greater in number than the first, holds that a telegraph company is not the agent of either the sender or addressee of a telegram, but is a public carrier whose relation to the parties is that of an independent contractor. Of these, the following may be cited: *Pepper v. Western U. Tel. Co.*, 87 Tenn. 554; *Strong v. Western U. Tel. Co.*, 18 Idaho 389; *Shingleur v. Western U. Tel. Co.*, 72 Miss. 1030; *Postal Tel. Cable Co. v. Schaefer*, 110 Ky. 907; *Eureka Cotton Mills v. Western U. Tel. Co.*, 88 S. C. 498.

No case in Illinois has been cited, and we know of none, in which the precise question involved in this contention has been squarely decided. There are several cases in Illinois which hold that a telegraph company is, to some extent and for some purposes, the agent of the party who employs it to transmit a telegraphic message. *Morgan v. People*, 59 Ill. 58; *Western U. Tel. Co. v. Harris*, 19 Ill. App. 347; *Anheuser-Busch Brewing Ass'n v. Hutmacher*, 127 Ill. 652. In the case last cited, however, the court expressly stated, with reference to the facts of that case, that: "It should be observed that there is no suggestion that any of these messages were erroneously transmitted, and the case therefore does not present the question, upon which there is some conflict in the authorities, whether the sender of a telegram makes the telegraph company its general agent so as to become responsible for the acts of such agent where there is a departure from the authority actually given, by transmitting the message incorrectly."

It would be interesting, and possibly instructive, to analyze the cases in which this question has been discussed, for the purpose of arriving at some satisfactory conclusion, if that be possible, as to which of the various reasons given in such cases seems to be the best supported in principle. We do not find it necessary to do so in this case, however, for the reason that

many of the cases which follow the independent contractor theory, as well as those which follow the agency theory, hold that if an altered telegram is received and acted upon by the addressee, *before the discovery of the mistake*, the sender of the telegram is thereafter only bound to take such steps to avoid loss "as a reasonably prudent man would take to save himself, had the mistake or error been his own," and that if he does this, and a loss nevertheless ensues, the telegraph company is liable therefor. *Pepper v. Western U. Tel. Co., supra; Strong v. Western U. Tel. Co., supra; Eureka Cotton Mills v. Western U. Tel. Co., supra; Postal Tel. Cable Co. v. Schaefer, supra; Fisher v. Western U. Tel. Co., 119 Ky. 885; Western U. Tel. Co. v. Shotter, supra.*

Upon this question, the case of *Pepper v. Western U. Tel. Co. supra*, while holding that a telegraph company is not the agent of the party employing it, says, as to the question of damages in such cases, where the goods have been shipped before the mistake is discovered:

"In such cases the courts will not be over nice, on behalf of the negligent company, in adjusting the scales to the wisdom of the several means open to the party injured, and undertake to weigh carefully the question as to what was best as then appeared, and certainly not as to what was best as seen in the light of subsequent events, but will merely require the victim of the negligence to act in good faith, in the exercise of ordinary prudence, in the effort to extricate himself from the situation in which he has been placed. Where this has been done, the loss resulting will be the measure of damages which he will be entitled to recover, upon the doctrine of compensation."

The same view, in another form, is expressed in the case of *Western U. Tel. Co. v. Shotter, supra*, which holds that a telegraph company is the agent of its employer. The court there said:

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“Whether the telegraphic operator be the agent of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not; and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer actually made, though, by mistake of the agency he used to convey it, and when he does so settle in good faith, and is induced to do so by the negligence of the telegraphic company, through its servants, that company should respond to him in damages, whether absolutely bound by his contract or not.”

We think these quotations are peculiarly applicable to the facts of this case, and are decisive of the present contention, regardless of the question whether the defendant was the agent of the plaintiff, or an independent contractor. The record shows that when the plaintiff was on the witness stand, he gave as his reason for not returning the dresses a second time to Baruch, that he “was compelled to keep them.” The trial judge interrupted by asking the witness what he meant by this, and the witness replied that Baruch wrote him several letters in regard to the claim, threatening that if he did not keep and pay for the dresses, the bill would be handed over to a commercial agency, which was a consequence he “tried to avoid, as a bad thing in business.” It is true that this statement was stricken out on motion, but whether it was competent or not as evidence, it expresses the same view, in effect, that was expressed by the Georgia Supreme Court in the above quotation. It seems to us that this view of the matter is certainly more in accord with principles of justice and fair dealing than any view which would require the sender of a telegram in a similar case to refuse to be bound by the telegram, as delivered and

acted upon, and take the consequences of a doubtful lawsuit.

It is urged by defendant's counsel that this rule as to damages has only been applied where the goods shipped before the discovery of the mistake were perishable goods. An examination of the cases above cited, however, will show that the rule is not limited to perishable goods, but has been applied to such commodities as lumber (*Fisher v. Western U. Tel. Co.*, *supra*) and cotton yarn (*Eureka Cotton Mills v. Western U. Tel. Co.*, *supra*).

We may also add that the cases which hold that a telegraph company is not an agent of the person employing it, but is purely an independent contractor, seem to us to be strangely illogical in applying the above rule of damages, upon which nearly all of them agree. On the other hand, the cases which hold that a telegraph company is an agent of the party employing it, for the purpose at least of transmitting a message which completes a contract, are entirely consistent in applying the rule of damages above stated. We conclude, therefore, upon this branch of the case, that the defendant was liable to the plaintiff for any loss sustained by him as shown by the facts in this case.

As to the question of the amount of damages, it is urged that the finding and judgment are not supported by the evidence. The plaintiff testified that he did his best to dispose of the dresses after they were sent to him the second time; that he sold six of them, and that he was unable to sell the remainder. On cross-examination, he said these remaining dresses were worth \$1 each. While the evidence on this point is, in some respects, unsatisfactory and inconclusive, it is, nevertheless, the only evidence in the record, and is uncontradicted. The amount of the judgment, however, does not give credit for the value of the six dresses which remained in the plaintiff's possession, viz., \$6. In this respect, the judgment is erroneous, but this error

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can be cured by a remittitur. If, therefore, the plaintiff, within ten days from the date of filing this opinion, will remit the sum of \$6, the judgment for the remainder of \$157.60 will be affirmed; otherwise the judgment will be reversed and the cause remanded.

Affirmed on remittitur; otherwise reversed and remanded.

Abraham Slimmer and Lane J. Thomas, trading as Slimmer & Thomas, Plaintiffs in Error, v. Dolliver Savings Bank and Continental & Commercial National Bank of Chicago, Defendants in Error.

Gen. No. 20,554. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and judgment here with finding of facts. Opinion filed October 6, 1915.

Statement of the Case.

Attachment suit by Abraham Slimmer and Lane J. Thomas, trading as Slimmer & Thomas, in the Municipal Court against the Dolliver Savings Bank, a nonresident corporation, to recover an alleged indebtedness of \$912.50. The Continental and Commercial National Bank of Chicago was served as garnishee, and answered, admitting that the savings bank had \$4,384.31 on deposit with the garnishee. It appeared that plaintiffs were mortgagees of certain cattle and that all the cattle of the mortgagor were to be sold by a bank which, together with its cashier, held mortgages on other cattle and property of the mortgagor. The parties agreed to prorate any shortage that might result. After the sale the cashier reported a sale for \$15,913.50, and the amount due on the mortgages as

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\$16,657.33, leaving a shortage of \$743.83, not taking into account the expense of the sale. The same statement placed the expense of the sale at \$250.43. Later a different statement was rendered, placing the expense of sale at \$476.58, and the shortage at \$1,253.76, and a draft of \$3,592.30 was delivered. Subsequent negotiations followed by letter, and the defendants later offered to pay \$119.24 of money collected if they would take an unsold hay press at a fair price and "let it go toward your bill."

This offer was refused and this suit commenced. Upon a trial before the court without a jury, the court found that there was due the plaintiffs from the saving bank the sum of \$119.24, and judgment was rendered accordingly. The plaintiffs then sued out this writ of error.

RUDOLPH WOLFNER, for plaintiffs in error.

MAYER, MEYER, AUSTRIAN & PLATT, for defendants in error.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. ACCORD AND SATISFACTION, § 1*—*what constitutes*. To constitute an accord and satisfaction, there must be an honest difference between the parties as to the amount due, and the check or draft must be offered under such circumstances as amount to a condition that it is to be received in full payment of the demand.

2. CONTRACTS, § 32*—*when provisions of contract are not binding on party*. Where a mortgagee and a bank agreed to prorate the shortage resulting from a sale of mortgaged cattle, and the bank stated that such shortage was a certain sum, not including the expense of the sale, *held* that the other mortgagee was not liable for an item of expense whereby the bank was to receive a discount or fee for handling papers without recourse, there being no evidence that such mortgagee was party to such an agreement between the bank and the mortgagor.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cross v. City of Chicago, 195 Ill. App. 86.

**Nellie A. Cross, Plaintiff in Error, v. City of Chicago,
Defendant in Error.**

Gen. No. 20,638.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what is nature of affidavit of merits.* An affidavit of merits is analogous to a statutory notice of defense under the general issue.

2. MUNICIPAL CORPORATIONS, § 1233*—*what declaration for personal injuries must aver.* Under Hurd's Rev. Stat. 1912, p. 1290, Sec. 2 (J. & A. ¶ 6190), as to notice to a city of an accident resulting in personal injuries, a declaration which fails to aver such notice states no cause of action.

3. MUNICIPAL CORPORATIONS, § 1224*—*what is effect of pleading as to waiving notice of injuries.* A city cannot waive the statutory requirement as to notice of an accident resulting in personal injuries (Hurd's Rev. Stat. 1912, p. 1290, sec. 2, J. & A. ¶ 6190) and no pleading filed by it can have the effect of a waiver or an admission of such notice on the part of the city.

4. MUNICIPAL CORPORATIONS, § 1233*—*what is effect of doctrine of "express aider" as to pleading notice of injury.* In an action against a city for damages for personal injuries, where the statement of claim failed to aver statutory notice of the accident (Hurd's Rev. Stat. 1912, p. 1290, sec. 2, J. & A. ¶ 6190), and the city filed an affidavit of merits more than a year after the accident stating, in addition to denials, that the city was not notified of the accident as required by statute, *held* that the doctrine of express aider could not be applied to cure the defect of the statement of claim.

Error to the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

EDWARD H. STEARNS, for plaintiff in error.

JOHN W. BECKWITH and N. L. PIOTROWSKI, for defendant in error; DAVID R. LEVY, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

By this writ of error it is sought to reverse a judgment of the Municipal Court, wherein the suit of the plaintiff, Nellie A. Cross, was dismissed, at plaintiff's costs, upon the ground that the statement of claim does not state a cause of action.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The suit was a fourth-class case in tort brought to recover damages for personal injuries, and was begun on August 8, 1913. The plaintiff's statement of claim avers, in substance, that the city negligently permitted a sidewalk on one of the city streets to be and remain in unsafe repair and condition, and to be obstructed by a section of bent iron pipe, a portion of which protruded above the sidewalk; that on August 11, 1912, in passing over said sidewalk, the plaintiff unavoidably tripped over said iron pipe and was thrown to the sidewalk, breaking her left wrist and wrenching her right ankle; and that in consequence thereof, she suffered great pain and was prevented from performing her usual duties and was obliged to pay out divers sums of money in endeavoring to be cured, to her damage in the sum of \$1,000. There is no averment in the statement of claim that any notice of the accident was given to the city, as required by section 2 of "An act concerning suits at law for personal injuries and against cities, villages and towns," in force July 1, 1905. (Hurd's Rev. Stat. 1912, p. 1290, J. & A. ¶6190.)

The city was served with summons, returnable August 23, 1913, and on August 21, 1913 (more than a year after the date of the alleged accident), the city entered its appearance and filed an affidavit of a meritorious defense, containing a categorical denial of each of the averments of the statement of claim, and also the following: "That there is no liability on the part of the defendant, City of Chicago, for such condition as that described in the plaintiff's statement of claim * * * in that the City is not notified of the alleged accident as required by Statute."

The case was placed upon the jury calendar, and when reached was dismissed for want of prosecution. A few days later, however, the order of dismissal was vacated, and the cause set for hearing on the 8th day of June, 1914. On June 5, 1914, the defendant, by its attorney, moved to strike the statement of claim from

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the files and dismiss the suit, upon the ground that the statement of claim fails to allege that the statutory notice was given to the city. The "statement of facts," as certified by the trial judge, states that the plaintiff's attorney appeared in opposition to this motion, and argued (1) that the statement of claim was sufficient to reasonably inform the defendant of the nature of the case it was called upon to defend, without alleging the additional fact of notice, as required by statute; and (2) that the omission of any allegation of notice was cured by the defendant's denial in its affidavit of merits that any such notice had been given, which (it was argued) "made an issue of fact as to whether the statutory notice was given," the plaintiff's attorney stating that he was prepared to prove *at the trial* that notice was, in fact, given as required by statute; that after argument upon the motion, the court held that the statement of claim failed to allege a cause of action against the city, and granted the motion to dismiss.

The same contentions, in substance, are repeated in this court, and the question is thus presented, whether the absence of any averment of notice to the city in the plaintiff's statement of claim can be cured by an assertion in the city's affidavit of merits that no such notice was given. Both parties have treated the affidavit of merits as a pleading, though in fact it is more nearly analogous (when filed pursuant to some rule of the Municipal Court, as it probably was in this case) to a statutory notice of defense under the general issue. For the purposes of this opinion, we shall treat it as a plea. In the recent case of *Gilman v. Chicago Rys. Co.*, 268 Ill. 305, it was held that a statement of claim in the Municipal Court must state a cause of action, although it is not necessary to state it with the particularity of a common-law declaration.

In *Walters v. City of Ottawa*, 240 Ill. 259, it was held that since the enactment of the statute above men-

tioned, a declaration in a personal injury case against a city, which fails to aver that a notice was given, as required by section 2 of that Act, states no cause of action. It was also held that "the city has no power to waive the notice and is under no liability until it is given." The plaintiff insists, however, that notwithstanding the decision in the *Walters* case, *supra*, the absence of any averment in the statement of claim that the statutory notice was given may be cured by a plea which avers that no notice was given; that this result follows from a proper application of what is known, in pleading, as the doctrine of "express aider." This doctrine is defined as follows in 1 Chitty on Pleadings, 671: "A defect in pleading is aided, if the adverse party plead over to, or answer the defective pleading, in such a manner that an omission or informality thereon is expressly or impliedly supplied, or rendered formal or intelligible." Following this quotation, the author gives several instances of "express aider," from which it would appear that a defect in a pleading may be expressly aided by the pleading of an adverse party in cases where the adverse party, instead of objecting to the defective pleading, answers it in such a way that the answer amounts to an *admission* of the fact omitted, or a waiver of any objection founded upon such omission. Obviously, *if a city cannot waive* the statutory requirement, as held in *Walters v. City of Ottawa, supra*, no pleading filed by it can have the effect of a waiver or an admission on the part of the city.

In support of his contention, the plaintiff's counsel cites the case of *Wallace v. Curtiss*, 36 Ill. 156. That was an action of covenant upon a contract for the sale of lumber, which provided that the lumber should be inspected and measured by a person to be selected by the parties, and the declaration contained no averment that the lumber had been so inspected and measured. Instead of demurring to the declaration, the defend-

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ant filed special pleas alleging that no inspector was chosen, as provided by the contract. Issue was joined upon these pleas. Upon the trial, the plaintiff was permitted to prove that the lumber was inspected and measured by an inspector chosen by the parties, although there was no allegation to that effect in the declaration. This ruling was assigned as error, but the court held that as the defendants had tendered an issue upon that question of fact by their pleas, the plaintiff had a right to accept the issue so tendered and go to trial upon it, and that "the pleas cured the omission." Upon this point, the court said: "The issues were not alone on the facts stated in the declaration, but upon the agreement stated in the special pleas, and *they may be taken as amendatory of the declaration, of the issue and verdict, in order to favor the justice of the case.*" (Italics ours.) There is nothing in the opinion to indicate that there was any good reason why the defendants in that case might not thus supply the omitted fact in their pleadings, if they chose to do so, by expressly setting up the alleged failure to inspect as provided by the contract, and relying thereon. Nor does it appear that the omitted fact thus supplied was a *statutory prerequisite* to any right of action, as is the fact in the present case. Furthermore, in the case cited, the plaintiff accepted the issue tendered by the defendants' plea, and went to trial upon that issue. In this case, before any trial was had, or issue joined upon the affidavit of merits, the defendant made a motion to dismiss the suit upon the express ground that the statement of claim was wholly insufficient as a statement of a cause of action, in view of the statute above mentioned, and the motion was then and there sustained.

Plaintiff also cites several decisions of other States, notably Missouri and Kentucky, in which the doctrine of express aider seems to have been applied where the defendant's answer denied the existence of some

essential fact not referred to in the plaintiff's petition, and issue was joined upon such denial and a trial had upon the issues so framed. These cases, in principle, are like that of *Wallace v. Curtiss, supra*. In none of such cases does it appear that the fact omitted from the plaintiff's declaration or petition was a statutory prerequisite to a right of action, nor does it appear in any of such cases that there was any good reason why the defendant might not thus supply the omitted fact, either by waiver or express admission in his plea or answer. If, as is stated in *Wallace v. Curtiss, supra*, the underlying principle in such cases is that a plea which thus supplies an omitted fact "may be taken as amendatory of the declaration, in order to favor the justice of the case," that principle can have no application to the facts of this case. The affidavit of merits filed in this case, which is the only pleading—if it can be considered a pleading—filed by the city, was filed more than a year after the alleged date of the accident to the plaintiff. If, then, the affidavit of merits may be taken as *amendatory* of the statement of claim, then the plaintiff's cause of action was *first* stated when the affidavit of merits was filed, and at that time the cause of action was barred by limitation. It would be carrying the doctrine of express aider to an unheard of length to hold, under such circumstances, that a city had given life to a defunct cause of action, merely by asserting in its plea or affidavit of merits that plaintiff never had a cause of action because of her failure to give the statutory notice. No case has been cited which goes to that length and we believe none can be found. We are of the opinion that there is no merit in the plaintiff's contentions, and that the trial court did not err in dismissing the suit upon the motion of the city.

The judgment of the Municipal Court will be affirmed.

Affirmed.

Meras et al. v. Adinamis et al., 195 Ill. App. 92.

Evangelos Meras and Gust Rovokianes, Defendants in Error, v. Peter G. Adinamis and George Angelus, Plaintiffs in Error.

Gen. No. 20,653. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action by Evangelos Meras and Gust Rovokianes against Peter G. Adinamis and George Angelus. The declaration consisted of an *indebitatus* assumpsit count for goods, wares and merchandise sold and delivered, a *quantum valebant* count, and five common counts in assumpsit, for money lent and advanced, for money had and received, for interest, for value of work done and material furnished, and upon an account stated. To this declaration was attached an affidavit of claim stating that the demand of the plaintiffs is "for money obtained from the plaintiffs by the defendants," amounting to four hundred dollars. Appended was a copy of written contract for the sale of the defendant's confectionery store in Chicago to the plaintiffs, which states that the purchasers have deposited with the sellers two hundred dollars to be applied on the purchase price, "in case the above mentioned deal shall be consummated" within five days; that if the "deal" is not so consummated, "through the fault of" the purchasers, said deposit shall be retained by the sellers as liquidated damages, but if the sellers refuse to execute a bill of sale, then they shall return the deposit and pay two hundred dollars in addition thereto as liquidated damages. The defendants filed their written appearance and a plea of the general issue, accompanied by an affidavit of merits, made by the defendants' attorney, as to the whole of the plain-

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tiff's demand. When the case was called for trial neither the defendants nor their attorneys responded, and a judgment for four hundred dollars, together with costs, in favor of the plaintiffs was entered. Subsequently the defendants sued out this writ of error.

PANTELIS & RESA, for plaintiffs in error.

THOMPSON, CLARK & STEVENSON, for defendants in error.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 100*—*when default erroneously entered.* It is error to render a judgment against a defendant by default while a plea to the merits remains on file.

2. JUDGMENT, § 100—*what is necessary before default can be entered.* When there is a plea on file, a default does not exist merely because the defendant does not appear at the time the case is called for trial, but the plea must be stricken from the files upon due notice before there can be a default, or the issue joined must be tried.

3. PLEADING, § 1*—*when pleading need not be signed.* It is not necessary that a plea of the general issue should be signed by anybody.

Henry Schwartz, Defendant in Error, v. Chicago State Pawnors Society, Plaintiff in Error.

Gen. No. 20,667.

1. PLEDGES, § 42*—*when refusal to return pledged property is conversion.* Where a defendant refuses to surrender pledged property upon proper demand and a proper tender of the amount due, there is a wrongful act amounting to a conversion, and a statement of claim alleging such facts states, in substance, a cause of action in trover.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what are essentials of statement of claim.* It is immaterial what name a plaintiff in the Municipal Court may give to his action, and if the statement of claim shows a cause of action in tort, it will be treated as such.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. PAWNBROKERS AND SECONDHAND DEALERS, § 3*—*when pawn tickets are prima facie evidence.* In a suit to recover the value of pledged property which the pledgee refused to surrender, where the pawn tickets recited that the pledged property was to be delivered to any person presenting the tickets, the production of such tickets was prima facie evidence of the plaintiff's title, and when the plaintiff testified that he was the owner of the pledged property it was immaterial whether the pawn tickets were negotiable.

4. PLEDGES, § 22*—*when effect of tender cannot be avoided.* Where a pledgor of property offered to pay the amount of money loaned with interest, and the pledgee refused such amount on the ground that interest for another month was due, such pledgee could not subsequently avoid the effect of the pledgor's tender on the ground that one day's interest should have been included, and the tender was therefore insufficient.

5. PLEDGES, § 22*—*what is effect of tender.* Where a pledgor of property tendered the amount due to redeem the pledge and demanded the property, the pledgee's lien upon such property was extinguished and its retention of the same thereafter was unauthorized and unlawful, amounting to a conversion, and such result was not affected by the pledgor's failure to keep his tender good.

6. PAWNBROKERS AND SECONDHAND DEALERS, § 3*—*what is effect of restriction of liability printed on pawn ticket.* A provision of a contract printed on a pawn ticket, limiting the pledgee's liability for loss or damage to twenty-five per cent. more than the loan, does not apply to a case of conversion, but to loss occurring from negligence or accident.

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

LITZINGER, MCGURN & REID, for plaintiff in error.

BERNARD J. BROWN, for defendant in error.

MR. JUSTICE FITCH delivered the opinion of the court.

This suit was brought in the Municipal Court to recover the value of three diamonds upon which the defendant company had made a loan, and which defendant refused to deliver to the plaintiff upon demand and a tender of the amount due.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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It appears from the evidence that on November 25, 1912, one Miller deposited a diamond with the defendant as security for a loan of one hundred dollars, and on the same day, one Neiss also pledged a diamond ring and a loose diamond as security for a loan of two hundred and fifty dollars. Defendant issued its pawn tickets to the borrowers by name. Each of these tickets describes the property pawned and the amount loaned thereon, states that the interest is "one and one-half per cent. per month, can be paid monthly," that the loans are due in one month, with a privilege of renewal on payment of accrued interest within one year thereafter, that the property so pledged "may be delivered to any person presenting this pawn ticket," and that the Pawnors Society "shall not be liable for loss or damage in any event for more than twenty-five per cent. in addition to the amount loaned." It further appears that the diamonds were the property of the plaintiff and that he held the pawn tickets; that on May 26, 1913, after the loans had run six months and one day, plaintiff presented the tickets to defendant at its office, and tendered it in cash the amount of the loans with interest thereon for six months. The president of the defendant company refused the tender upon the ground that defendant was entitled to another month's interest because the loans had run one day more than six months. The plaintiff refused to pay the additional month's interest demanded and this suit followed. Upon a trial before the court without a jury, a judgment was rendered in favor of the plaintiff for \$449.92, being the value of the diamonds less the amount tendered, together with interest on the remainder at five per cent. The defendant sued out this writ of error.

The defendant contends, first, that as this action was brought as a fourth-class case "in contract" the plaintiff is not entitled to recover in his own name because, it is said, the pawn tickets are the only evidence of

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the contract and are not negotiable instruments; second, the alleged tender was insufficient, because it was not for the exact amount due, was not kept good, and was not unconditional; third, the judgment exceeds the limit of the liability of defendant as expressed in the contract. We think none of these contentions is well founded.

The plaintiff's statement of claim states, in substance, a cause of action in trover. The refusal of defendant to surrender the pledged property upon a proper demand and a proper tender of the amount due was a wrongful act amounting to a conversion. It is immaterial what name a plaintiff in the Municipal Court may give to his action. If the statement of claim shows a cause of action in tort, it will be treated as such (*Edgerton v. Chicago, R. I. & P. Ry. Co.*, 240 Ill. 311). The pawn tickets in this case recite upon their face that the pledged property may be delivered to any person presenting the tickets. The production of the tickets was therefore prima facie evidence of the plaintiff's title, and there is no evidence to overcome this presumption. Moreover, the plaintiff testified that he was the owner of the diamonds as well as the tickets. Whether such tickets are or are not negotiable, therefore, is an immaterial question in this case.

As to the question of tender, while it is true that the amount tendered on May 26, 1913, was seventeen and one-half cents less than the actual amount due at that time, yet the defendant did not place its refusal upon that ground. It refused upon the ground that because one day of another month had elapsed, it was entitled to a full month's additional interest. Having placed its refusal upon that ground, which was clearly unauthorized, we think it could not afterwards avoid the effect of such tender merely on the ground that it was seventeen and one-half cents less than it should have been.

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This tender and refusal instantly extinguished the defendant's lien upon the property, and its retention of the same thereafter was unauthorized and unlawful, and amounted to a conversion; and this result was not affected by the plaintiff's failure (if he did fail) to keep his tender good. *McPherson v. James*, 69 Ill. App. 337; *Norton v. Baxter*, 41 Minn. 146; *Mitchell v. Roberts*, 17 Fed. 776; *Loughborough v. McNevin*, 74 Cal. 250; 31 Cyc. 852. There were no conditions attached to the tender. The purpose of the tender was to redeem the pledge, and a demand for the return of the pledged property did not make the tender conditional.

As to the third contention, we are of the opinion that the provision of the contracts limiting the pledgee's liability to twenty-five per cent. more than the loan was not intended to apply to a case of conversion, but was intended to cover loss or damage to the property occurring from the defendant's negligence or by accident.

Finding no reversible error in the record, the judgment of the Municipal Court will be affirmed.

Affirmed.

Oscar E. Shaffer and Edith Shaffer, Defendants in Error, v. Natoma Farm, Plaintiff in Error.

Gen. No. 20,690. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Suit by Oscar E. Shaffer and Edith Shaffer, in the Municipal Court, against the Natoma Farm, a corpora-

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tion, to recover damages for breach of a contract of employment. Upon a trial before the court without a jury, plaintiffs recovered a judgment for two hundred and twenty dollars, and defendant sued out this writ of error.

ALDEN, LATHAM & YOUNG and ASA Q. REYNOLDS, for plaintiff in error.

WILLIAM A. JENNINGS, for defendants in error.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*when finding of court will not be disturbed.* Evidence, though conflicting, held to support a finding of the existence of a contract of employment for one year.

2. APPEAL AND ERROR, § 1258*—*when party cannot complain of amount of recovery.* A defendant cannot complain on appeal merely because the amount of damages allowed the plaintiffs was less than a sum which would have been justified under the evidence.

3. APPEAL AND ERROR, § 1414*—*when finding of court not justified by evidence.* Evidence held not to justify a finding of default under a contract of employment, for while the employees did not appear on a certain date as required by the contract, it appeared that they were prepared and ready to go but did not because defendant's agent telegraphed them not to do so.

4. FRAUDS, STATUTE OF, § 118*—*when statute must be pleaded.* If the Statute of Frauds is relied upon as a defense it must be pleaded, unless the plaintiffs' pleadings are in such form as to advise the defendant of the precise nature of the claim.

5. MUNICIPAL COURT OF CHICAGO, § 13*—*what is nature of affidavit of merits.* An affidavit of merits filed in the Municipal Court is not technically a pleading.

6. PLEADING, § 262*—*when amended or additional pleading is necessary.* Where a statement of claim sought recovery for damages for breach of a contract of employment, and the defendant filed an affidavit of merits denying such contract, the defendant could not defend upon a different theory without asking leave to file, and filing, an amended or additional affidavit.

7. APPEAL AND ERROR, § 425*—*when defense cannot be raised on appeal.* In an action for damages for breach of a contract of employ-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ment, where it appeared that the defendant at the trial orally urged the Statute of Frauds as a defense, but did not plead such defense by filing an amended affidavit of merits, a contention that the contract was void under the Statute of Frauds could not be urged on appeal, not being brought properly before the trial court for decision.

Joseph Daube, Defendant in Error, v. Jonas Kuppenheimer, Louis Kuppenheimer and Albert Kuppenheimer, trading as B. Kuppenheimer & Company, Plaintiffs in Error.

Gen. No. 20,789.

1. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 3*—*how long right to dismiss has existed.* The right to take a voluntary nonsuit in jury cases has not changed since the year 1819, and such right is specifically recognized in the Municipal Court Act, sec. 30 (J. & A. ¶ 3342).

2. TRIAL, § 183*—*when peremptory instruction may be withdrawn.* A trial judge may change his mind after he has announced his intention to give a peremptory instruction, and it is not error under ordinary circumstances to withdraw an instruction even after it has been read to the jury.

3. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 1*—*what is nature of right to take voluntary nonsuit.* The right to take a nonsuit is a substantial right and should not be taken away without giving the plaintiff some opportunity to exercise that right.

4. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 14*—*when party may take voluntary nonsuit.* Under the Practice Act, sec. 70 (J. & A. ¶ 8607) and sec. 30 of the Municipal Court Act (J. & A., ¶ 3342), as to the right to nonsuit, a plaintiff has the right to take a nonsuit if he so desires after he has learned the views of the court as to the law and before the jury actually retire.

5. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 14*—*when request for voluntary nonsuit not too late.* A request for a nonsuit in a jury trial does not come too late when made after the trial judge has directed a verdict and before the jury have done anything towards complying with the court's direction, and before any verdict has been signed, announced or otherwise rendered.

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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FELSENTHAL, BECKWITH, WILSON & SPINGLER, for plaintiffs in error; ARTHUR C. BACHRACH, of counsel.

ADLER & LEDERER, for defendant in error.

MR. JUSTICE FITCH delivered the opinion of the court.

The plaintiff, Joseph Daube, brought suit in the Municipal Court for \$8,721.99, alleged to be due him from the firm of B. Kuppenheimer & Company for salary and commissions on the sale of merchandise for the defendants. There were two trials. Upon the first trial a verdict was returned in favor of the plaintiff for \$6,221.91, which was set aside and a new trial granted. Thereupon the defendants paid into court the sum of \$1,991.03, admitted by them to be due to the plaintiff, and filed an amended affidavit of merits as to the remainder of the plaintiff's claim. A second trial was then had, covering several days' time and making a most voluminous record. After all the evidence was heard, the defendants orally and in writing moved the court to instruct the jury to find the issues for the defendants. This occurred during the forenoon session of July 15, 1913. The court heard arguments on the motion and took the same under advisement until two o'clock in the afternoon of the same day. At that time the court reconvened with all parties present and the jury in the jury box, whereupon the trial judge made the following statement: "In this case, gentlemen, I have come to the conclusion that it is incumbent upon the court to instruct the jury, *and I do instruct the jury* to assess the plaintiff's damages in the sum of \$1,991.03, and you will sign a verdict for that amount. Now, the parties are entitled to the court's view or reasons for this action, and the court is entitled to state them so that the court cannot be misunderstood." The court then began stating his reasons, and was still stating such reasons when, at 2:45 p. m., plaintiff's counsel interrupted and asked to be permitted to take a nonsuit. The record shows

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that after having made the preliminary announcement above quoted, and before he had begun stating his reasons, the trial judge handed a written form of verdict to the bailiff, but this form of verdict had not been signed by any of the jurors when the request for a nonsuit was made. The court allowed a nonsuit to be taken, and the suit was dismissed at the costs of the plaintiff. After making a motion to vacate the judgment, which was denied, the defendants sued out this writ of error.

The brief of counsel for defendants begins as follows: "The question presented to this court by this record is as follows: Has a trial Judge the power to permit a plaintiff to take a nonsuit *after the trial court has directed the jury to return a verdict* against the plaintiff *at the close of all the evidence*, and after pen, ink and the verdict is handed to the jury, and where the request for a nonsuit is first made forty-five minutes after the court had directed a verdict, and while the court is stating his reasons for his action, but before the verdict is signed?"

In *Howe v. Harroun*, 17 Ill. 494, 497, where the practice of taking *voluntary* nonsuits was under consideration, the court said: "By the common law the plaintiff could take a nonsuit at any time before the verdict of the jury was announced to the court."

In *Berry v. Savage*, 3 Ill. (2 Scam.) 261, it was said: "At common law, a plaintiff was permitted to take a nonsuit, at any time before the verdict was rendered in court. (*Wooster v. Burr*, 2 Wend. [N. Y.] 295.) But by the 13th section of 'an Act regulating the practice in the Supreme and Circuit Courts of this State, and for other purposes,' passed March 22, 1819, it is provided, that 'every person desirous of suffering a nonsuit on trial, shall be barred therefrom, unless he do so before the jury retire from the bar.'"

The identical words of the Statute of 1819 were reenacted in the general revisions of 1845 and 1874. In

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1907, this provision was amended to read as follows: "Every person desirous of suffering a non-suit shall be barred therefrom, unless he do so before the jury retire from the bar, or if the case is tried before the court without a jury, before the case is submitted for final decision." Practice Act, sec. 70 (J. & A. ¶ 8607).

Section 30 of the Municipal Court Act (J. & A. ¶ 3342) is, in part, as follows: "Every person desirous of suffering a non-suit on trial shall be barred therefrom unless he do so before the jury retire from the bar, or before the court, in case of the trial by the court without a jury, states its finding."

From these quotations it will be seen that the law in this State with reference to the right of a plaintiff to take a voluntary nonsuit in jury cases has not changed since the year 1819, and that this right is specifically recognized in the Municipal Court Act. The only change that has been made in the statutory law with reference to nonsuits has been the addition in 1907 of a clause fixing the time when the right is barred in nonjury cases. In jury trials, the only limitation that has ever been imposed by statute in this State upon the common-law right of a plaintiff to dismiss his suit at any time before a verdict is returned is the provision that he must do so "before the jury retire from the bar." In the ordinary case of a trial by jury the jury do not "retire from the bar" until they have heard all the evidence, the arguments of counsel *and the instructions of the court*; and in such case, it is the undoubted right of a plaintiff, under the statute, to dismiss his suit at his costs, after all the instructions have been given, provided he does so in the moment of time that usually intervenes between the reading of the last instruction and the actual retirement of the jury from the jury box to consider their verdict. In this case, the only instruction given was an oral instruction "to assess the plaintiff's damages" at the amount admitted by the defendants to be due,

which, in effect, amounted to a peremptory instruction to the jury to return a verdict in favor of the defendants as to the only matters in controversy. Upon the giving of such a peremptory instruction, the usual practice is to hand to the jury a prepared form of verdict, which is signed by the jury, under ordinary circumstances, without leaving the jury box. The real question in this case, therefore, is whether a request for a nonsuit in a jury trial comes too late if made after the trial judge has directed a verdict, but before the jury has done anything towards complying with the court's direction, and before any verdict has been signed, announced or otherwise rendered.

In *Berry v. Savage*, *supra*, after the jury had heard all the evidence, and had retired to consider their verdict, they returned into court and asked for instructions as to the effect of certain evidence. The court gave such an instruction, and thereupon, *after the instruction was so given*, the plaintiff's counsel asked for a nonsuit. The trial court refused this request, but the Supreme Court held that the right to a voluntary nonsuit was not barred under the statute until the jury retired the second time, *because all the instructions had not been given until that time*. The court said: "We are clearly of the opinion that the plaintiff had a right to submit to a nonsuit, *when the instructions were given.*"

In *Howe v. Harroun*, *supra*, it is said: "Both by the common law and by our statute, when the case is tried by a jury, the plaintiff, before he determines whether he will take a nonsuit, not only has an opportunity of knowing precisely what the testimony is upon which his rights depend and upon which the jury are to act, *but he also hears the charge* of the court to the jury so that he knows by what rules of law the jury are to be governed in deciding upon those facts. And all know, who have carefully observed the course of *nisi prius* trials, that *it is as necessary to understand how*

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the law is to be laid down to the jury as to know what are the facts, to enable a party judiciously to determine whether or not to take a nonsuit; while it may be conceded, with equal propriety, that the party should not know what is the opinion of the jury." (Italics ours.)

Following this reasoning, it is manifest that a plaintiff cannot "hear the charge of the court" in any case until the court had pronounced such charge, and hence is not in a position to "judiciously determine whether or not to take a nonsuit" until *after* he has heard the charge *given*, i. e., spoken or read, to the jury. This being true, it can make no difference, in principle, whether the instruction so given be peremptory or otherwise, for in either case the plaintiff cannot definitely know the views of the court as to the law of the case until the instruction is given to the jury.

In *Brown v. Lawler*, 130 Ill. App. 540, a motion was made by the defendant at the close of all the evidence to instruct the jury to find the defendant not guilty, and the defendant presented to the court a written instruction to that effect to be given to the jury. After argument on the motion, the court sustained it and marked the instruction "given," and arose to read the instruction to the jury, when the plaintiff, before the instruction had been read, moved for a nonsuit. The trial court denied the motion and instructed the jury to find the defendant not guilty, and afterwards entered judgment on the verdict. This judgment was reversed by the Appellate Court of this district upon the authority of *Berry v. Savage*, *supra*, and *Howe v. Harroun*, *supra*.

In *Sroke v. R. W. McCready Cork Co.*, 156 Ill. App. 506, heard in the Appellate Court of this district upon a writ of error to the Municipal Court, the facts, as stated in the opinion, were as follows: "When plaintiff rested his case defendant moved to instruct a verdict in its favor. This motion the trial judge determined to allow and was about to instruct the jury to

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render its verdict in defendant's favor when plaintiff, the jury still being in the jury box and not having left the bar of the court, moved for a nonsuit. This motion the court allowed and judgment for costs against plaintiff was accordingly entered." This judgment of the Municipal Court was affirmed upon the ground that section 30 of the Municipal Court Act (J. & A. ¶ 3342), which, it was pointed out, is the same as section 70 of the Practice Act (J. & A. ¶ 8607) so far as jury trials are concerned—permits a plaintiff to take a nonsuit at any time before the jury retires from the bar of the court. The court there said: "As early as *Berry v. Savage*, 2 Scam. 261, the court in construing this statute gave it a broad interpretation by holding that plaintiff's right to a nonsuit was not barred *until the whole case, evidence and instructions, were with the jury*, and that in the event of the jury returning to the bar of the court for further instructions, then before the jury again retired from the bar of the court the plaintiff might, if he saw fit, take a nonsuit." (Italics ours.)

In *McMechen v. Chicago, B. & Q. Ry. Co.*, 166 Ill. App. 150, upon a trial before a jury in the Circuit Court, the defendants moved for a peremptory instruction in their favor at the close of the plaintiff's evidence. The jury were excused, the motion was fully argued on both sides, and, at the conclusion of the argument, the court announced that he would give the peremptory instruction. The jury were sent for, but before they returned to the box, plaintiff's counsel asked leave to take a nonsuit. This request was denied, and the jury returned a verdict pursuant to the peremptory instruction of the court. Upon motion for a new trial, however, the verdict was set aside and the nonsuit allowed. This judgment of nonsuit was affirmed in the Appellate Court. In the opinion it is said:

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“This question under the practice in this state is governed by statute. Under the statute before it was amended, as construed by our Supreme Court, in order to bar the plaintiff’s right to submit to a nonsuit, the jury must have the whole of the case down to and including the instructions of the court. If for any reason the jury retired from the bar without having the whole of the case, the evidence, arguments and the law as announced in the court’s instructions, the plaintiff’s right to a voluntary nonsuit was not taken away. This rule secured to a plaintiff not only the right of knowing the whole of the evidence in the case, but also of having the benefit of the arguments of opposite counsel, *and the law of the case as given by the court*, so that he might judiciously determine whether or not to take a nonsuit in a jury trial.” (Italics ours.)

- It is true that in the same opinion the court said that where a motion is made for a peremptory instruction in a jury case, the plaintiff is entitled to take a nonsuit “provided he elected to do so prior to the reading of the peremptory instruction to the jury.” But this proviso is a *dictum* merely under the facts of that case, is not found in any of the cases cited by the learned writer of the opinion, and is inconsistent with the view expressed in the opinion that the plaintiff is *entitled to know* “the law of the case as given by the court, so that he might judiciously determine whether or not to take a nonsuit.” A trial judge may change his mind after he has announced his intention to give a peremptory instruction; and it is not error, under ordinary circumstances, to withdraw an instruction even after it has been read to the jury. *Devine v. City of Chicago*, 178 Ill. App. 39.

In practice, the decision of the court upon a motion for a peremptory instruction is usually announced to counsel before the instruction is, in fact, read or given to the jury; and this practice is certainly in accord with the principle announced in the cases above cited. In the present case, however, the court orally in-

structed the jury to find a verdict *in the same sentence* in which he announced his decision upon the motion for an instructed verdict, without giving the plaintiff's counsel any opportunity whatever to move for a nonsuit until after the instruction had been orally pronounced. It is conceded by defendant's counsel that if the trial judge had not actually instructed the jury to sign a verdict, but had merely announced his intention to do so, and stated the reasons that prompted him so to do, the plaintiff's right to a nonsuit would not have been barred if exercised before the formal instruction was pronounced. The right to take a nonsuit is a substantial right, and ought not to be taken away without giving the plaintiff some opportunity to exercise that right. To hold that the plaintiff's right was barred merely because the peremptory instruction was pronounced in the same breath with the announcement of the court's decision upon the motion for an instructed verdict, would be, in effect, to deprive the plaintiff of any right of election, and, in our opinion, would give more effect to mere form than to substance. If, as was held in the cases above cited, the statute was intended to secure to a plaintiff not only the right of knowing the whole of the evidence in the case, but also of having the benefit of the arguments of opposite counsel and the law of the case as given by the court, so that he may (then) judiciously determine whether or not to take a nonsuit, then it follows that he cannot be deprived of that right until he has had an opportunity to make his election after he is advised of the court's views as to the law of the case. The important and essential thing is that the plaintiff shall have an opportunity to take a nonsuit, if he so desires, after he has learned the views of the court as to the law, and before the jury actually retire; and it is unimportant and immaterial whether such knowledge is conveyed to him by a preliminary

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announcement of the court's views upon the law of the case, or by an instruction to the jury.

It is contended by defendant's counsel that where a peremptory instruction is given in a jury case, the actual signing of the verdict by the jury is a mere matter of form which may legally be dispensed with, and therefore, it is said, the moment the peremptory instruction is given, the function of the jury ceases, and there is, in effect, a "retirement" of the jury from the bar. If this conclusion is sound, then, by the same reasoning, the actual reading of the peremptory instruction to the jury—or, in the Municipal Court, the oral utterance of such an instruction to the jury—is also a mere formality, which may legally be dispensed with, and the jury's functions would cease as soon as the court has reached a conclusion as to the legal questions raised by a motion for a directed verdict, favorable thereto, whether such conclusion be announced by the court or not. If this were the intention of the statute, it should read as follows: Every person desirous of suffering a nonsuit shall be barred therefrom unless he do so before the arguments are concluded, or before the court has announced any conclusion as to the law of the case. Such is not the reading of the statute.

For the reasons stated, the judgment of the Municipal Court will be affirmed.

Affirmed.

Martin Lavin, Administrator, Appellee, v. Wells Brothers Company, Appellant.

Gen. No. 20,799.

1. APPEAL AND ERROR, § 38*—*what is extent of Appellate jurisdiction of Appellate Court.* Under section 8 of the Appellate Court Act

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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(J. & A. ¶ 2968) and section 91 of the Practice Act (J. & A. ¶ 8628) the jurisdiction of the Appellate Court in matters of appeal is confined to appeals from final judgments, orders or decrees entered "in any suit or proceeding at law or in chancery."

2. COURTS, § 101*—*how jurisdiction of Superior Court is conferred.* The authority of the Superior Court to hear and determine questions under the Workmen's Compensation Act of 1911 (J. & A. ¶ 5459) was conferred by section 10 of such Act.

3. WORKMEN'S COMPENSATION ACT, § 12*—*what is nature of proceeding in Superior Court.* A proceeding in the Superior Court as to the application of the Workmen's Compensation Act, under section 10 of the Act of 1911 (J. & A. ¶ 5459), is *sui generis*—a creature of the statute—a summary proceeding in which facts and questions are "investigated" in any manner that may seem to be "reasonably necessary."

4. WORKMEN'S COMPENSATION ACT, § 12*—*what is nature of suit for compensation.* A proceeding in the Superior Court under section 10 of the Workmen's Compensation Act of 1911 (J. & A. ¶ 5459) is not a suit conducted in accordance with either the forms and modes of procedure of either a suit at law or in chancery, does not involve any personal or property right that can be enforced at law or in equity and is not brought for the recovery of damages occasioned by the infringement of a right.

5. APPEAL AND ERROR, § 316a*—*when Appellate Court is without jurisdiction to entertain appeal.* The Appellate Court is without jurisdiction to entertain an appeal from the Superior Court where a decision is entered under section 10 of the Workmen's Compensation Act of 1911 (J. & A. ¶ 5459) allowing a certain sum to be paid for injuries.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Appeal dismissed. Opinion filed October 6, 1915.

F. J. CANTY, for appellant; ZIMMERMAN, MYERS & GARRETT, of counsel.

GORMAN, POLLACK, SULLIVAN & LIVINGSTON, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

This is an appeal from an order of the Superior Court of Cook county, awarding to appellee, as admin-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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istrator of the estate of Thomas Lavin, deceased, the sum of \$3,500, to be paid in weekly instalments of \$8.61 each, as the amount of compensation payable under the Workmen's Compensation Act of 1911 (J. & A. ¶ 5449 *et seq.*), for injuries (resulting in death) sustained by said Thomas Lavin while in the employ of appellant. Appellant seeks to have the order or judgment reversed upon the alleged grounds that there is no evidence to show that the injury which caused the death of the deceased employee arose "out of and in the course of" his employment, that the evidence does not show that the deceased left him surviving lineal or collateral heirs "to whose support he had contributed within five years previous to the time of his death," that nonresident alien heirs are not entitled to the benefits of the Workmen's Compensation Act of 1911, that there were sundry errors in the admission of evidence, and that the court erred in refusing to hold certain propositions of law offered by appellant.

It will be noticed that all these contentions proceed upon the theory that the proceeding in the Superior Court was an action or proceeding at law. A motion was heretofore made by appellee, which was reserved to the hearing, to dismiss the appeal upon the ground that the proceeding in the Superior Court was neither an action at law nor a suit in equity, but was purely a statutory proceeding, and that the statute does not provide for an appeal in such cases.

We do not find any provision in the Compensation Act of 1911 authorizing such an appeal. Hence, if this court has any jurisdiction of this appeal, it derives its jurisdiction either from the Appellate Court Act, or from the General Practice Act. Section 8 of the Appellate Court Act (J. & A. ¶ 2968) provides that this court shall "have jurisdiction of all matters of appeal or writs of error from the final judgments, orders or decrees of any of the circuit courts, or the superior court of Cook county, or county courts, or

from the city courts *in any suit or proceeding at law, or in chancery* other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute.” Section 91 of the Practice Act (J. & A. ¶8628) provides that: “Appeals shall lie to and writs of error from the appellate or supreme courts, *as may be allowed by law*, to review the final judgments, orders or decrees of any of the circuit courts, the superior court of Cook county, the county courts or the city courts and other courts from which appeals and to which writs of error may be allowed by law, *in any suit or proceeding at law or in chancery.*”

In both of these sections, the jurisdiction of this court in matters of appeal is confined to appeals from final judgments, orders or decrees entered “in any suit or proceeding at law or in chancery.” The question is therefore presented whether the proceeding in the Superior Court can be considered as “a suit or proceeding at law or in chancery,” within the meaning of those words as used in the statutes above mentioned.

In *Grier v. Cable*, 159 Ill. 29, it was said: “A suit or proceeding at law, as those terms are used in section 8 of the Appellate Court Act, must be understood to mean a suit or proceeding instituted and carried on in substantial conformity with the forms and modes prescribed by the common law.” This sentence was quoted with approval in *Myers v. Newcomb Drainage Dist.*, 245 Ill. 140, where it was also said: “And on like principle a suit or proceeding in chancery must be understood to mean a suit or proceeding instituted and carried on in substantial conformity with the forms and modes prescribed by the rules of chancery.” In *Grier v. Cable*, *supra*, it was held that section 8 of the Appellate Court Act does not give the Appellate Court jurisdiction of an appeal from a County Court in the matter of a contested claim against the estate

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of a deceased person, because such a proceeding is neither a suit nor proceeding at law or in chancery, but is purely a statutory proceeding; and in *Myers v. Newcomb Drainage Dist.*, *supra*, the same reasoning was applied to a proceeding in the County Court for the organization of a drainage district. In the latter case, the court also held that section 91 of the Practice Act confers no right of appeal from or writ of error to the Appellate Court "in any case which is instituted and carried on in conformity with forms and modes not according to or recognized by the common law or rules of chancery but solely in accordance with statutory provisions."

The authority of the Superior Court to hear and determine such questions as were raised in this proceeding, and to make the order complained of, was conferred by section 10 of the Compensation Act of 1911 (J. & A. ¶5459). That section provides, in substance, that "Any question of law or fact arising in regard to the application of this law in determining the compensation payable hereunder shall be determined either by agreement of the parties or by arbitration as herein provided;" that if such questions cannot be settled by agreement, the employee and the employer shall each select "a disinterested party," and a third "disinterested party" shall be appointed by the judge of the County Court, "or other court of competent jurisdiction," of the county where the injured employee resided or worked at the time of his injury, and that the three persons so selected shall constitute a board of arbitrators "for the purpose of hearing and determining all such disputed questions of law or fact arising in regard to the application of this law in determining the compensation payable hereunder;" that it shall be the duty of both the employer and the employee to submit to such board of arbitrators all facts or evidence in their possession or under their control relating to such questions; that the board

of arbitrators shall hear the evidence submitted, and “shall have access to any books, papers or records of either the employer or the employe showing any facts which may be material to the questions before them;” and such board “shall be empowered to visit the place or plant where the accident occurred, to direct the injured employe to be examined by a regular practicing physician or surgeon, and to do all other acts reasonably necessary *for a proper investigation* of all matters in dispute;” and that a copy of the report of the arbitrators shall be filed in the State Bureau of Labor Statistics, “and shall be binding upon both the employer and the employe except for fraud and mistake: *Provided*, that either party to such arbitration shall have the right to appeal from such report or award of the arbitrators to the circuit court or the court that appointed the third arbitrator of the county where the injury occurred by filing a petition in such court within twenty days after the filing of the report of the arbitrators, and upon filing a good and sufficient bond, in the discretion of the court, and upon such appeal the questions in dispute shall be heard *de novo*, and either party may have a jury upon filing a written demand therefor with his petition.”

What, then, is the nature of the proceeding in the Circuit, Superior or County Court, which comes before such court upon appeal from the decision of a board of arbitrators selected as provided by said section 10? By the terms of that section, the appeal is instituted “by filing a petition in such court” within twenty days after the report of the arbitrators is filed, and by filing a bond, if the court requires one to be filed. The statute does not provide for any other or further pleadings of any kind whatever. What such petition shall contain is not prescribed by the statute. Presumably, it should aver that an employee was injured in the course of his employment, that some question or questions of law or fact had arisen “in regard to the application”

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of the Compensation Act of 1911 "in determining the compensation payable thereunder" to the injured employee, upon which question or questions the parties had been unable to agree and had therefore submitted them to a board of arbitrators, as provided by said section 10, and that the petitioner was not satisfied with the decision of the arbitrators. It would not be necessary to set forth in such petition the terms of the arbitrators' report, for the reason that section 10 provides that "upon such appeal the questions in dispute shall be heard *de novo*," and hence it is immaterial, upon such appeal, how or in what manner the board of arbitrators may have disposed of such questions. Upon the filing of such a petition, the appeal is ready to be heard before the court, or before a jury, if a written demand be made therefor. What order or judgment, if any, the court shall enter after the questions in dispute shall have been heard and determined, the act does not prescribe. Since, however, the ultimate object of the proceeding is to determine the amount of compensation, if any, payable under the provisions of the Compensation Act to the injured employee, it would seem that the proper order to be entered is one that finds and determines the amount of such compensation. In arriving at that result, and for the purpose of determining that amount, it is apparent from the provisions of section 10 that the court in which the proceeding is pending must have the same powers as the board of arbitrators, and, presumably, must perform the same duties, viz., to hear all the evidence submitted, including any books, papers or records of either party that show any fact which may be material to the questions in dispute, to "visit the place or plant where the accident occurred," to direct the injured employee to be examined by a physician, and "*to do all other acts reasonably necessary for a proper investigation of the matters in dispute.*" Some of these functions are judicial; others are not.

Such a proceeding does not conform to any of the recognized forms and modes of procedure of either an action at law or a suit in equity. It is *sui generis*—a creature of the statute—a summary proceeding in which facts and questions in dispute are “investigated” in any manner that may seem to be “reasonably necessary.”

In *Brueggemann v. Young*, 208 Ill. 181, it was held that the constitutional provision which gives to Circuit Courts “original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law,” includes the prosecution of every claim or demand in a court of justice which was known at the adoption of the constitution as “an action at law or a suit in chancery,” and also all actions since provided for, in which personal or property rights are involved, which belong to the same class, or are of the same nature, as actions at law or in equity, such as cases “where the Legislature creates a new statutory remedy for the recovery of property or for damages occasioned by the infringement of a right.” But in the same case it was held that where the Legislature has conferred jurisdiction upon the Circuit Court to hear and determine matters which are neither actions at law nor suits in equity, as those terms are ordinarily understood, and do not involve personal or property rights such as are ordinarily enforced by an action at law or suit in equity, and are not for the recovery of damages occasioned by the infringement of a right, such a proceeding must be classified as a purely statutory proceeding. The proceeding in question in this case comes within this classification. It is not a suit conducted in accordance with the forms and modes of procedure of either a suit at law or in chancery; it does not involve any personal or property right that can be enforced by an action at law or in equity; and it was not brought “for the recovery of damages occasioned by the infringement of a right.” The compen-

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sation payable under the Workmen's Compensation Act of 1911 cannot be considered as "damages occasioned by the infringement of any right." It is an amount arbitrarily fixed by the statute, to be paid by the employer to an employee who is injured in the course of his employment, whether such employee would have any right to recover damages from his employer for such injury or not. The statute does not compel either party to accept the provisions of the act. Such acceptance is a matter that is purely optional with them. But if they elect to come under its provisions, they waive their right to sue or defend as at common law, and consent to adjust their disputes, if any should arise, as to the amount of compensation that should be paid, by resort to arbitration with but one appeal from the decision of the arbitrators. In the brief of appellant's counsel it is said: "The purpose of the Compensation Acts was to insure to the employee and dependents *the certainty of some income during disability*; and to the dependents, after the employee's death, *the certainty of some recoupment against the loss of support*. It also was the purpose *to protect the employer from expensive and vexatious law suits* and to give him a standard by which, from experience or actuarial figures, he could estimate the percentage of probable loss from injuries in the business and charge it up so as to make the industry bear the loss." (Italics ours.) Conceding that this is a fair statement of the purposes of the Compensation Act, it must be apparent to anyone that such purposes would be frustrated in many cases if the decision of the board of arbitrators upon the disputed questions could be reviewed, first, by a *nisi prius* court, then by this court, and finally by the Supreme Court. If this could be done, then the only practical result of such legislation in many cases would be to project both employer and employee into a new and untried field of litigation, fully as vexatious, as dilatory, and

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as expensive as that which the act was designed to avoid. We cannot believe that such was the legislative intention.

For the reasons stated, we are of the opinion that this court is without jurisdiction to entertain this appeal, and the motion of appellee will therefore be sustained and the appeal dismissed at the costs of appellant.

Appeal dismissed.

William T. Warren, Appellant, v. Renault Freres Selling Branch, Appellee.

Gen. No. 20,831. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Suit by William T. Warren against the Renault Freres Selling Branch, a New York corporation, to recover damages for breach of warranty in the sale of an automobile. A verdict was directed in favor of the defendant, and upon entry of judgment the plaintiff brought this appeal.

WILLIAM A. JENNINGS, for appellant.

BURBY, JOHNSTONE & PETERS, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 398*—*what not recoverable in action for breach of warranty.* In a suit for damages for breach of warranty in the sale of an automobile, evidence that the defendant failed to overhaul the car without expense as agreed was incompetent, since there was no

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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avement in the statement of claim of liability for failure to make repairs without cost and the plaintiff did not amend his pleading.

2. MUNICIPAL COURT OF CHICAGO, § 13*—*what is extent of abolition of formalities in pleading.* While the formalities of pleading have been abolished by statute, it is still the law in the Municipal Court that a party is limited in his evidence to the claim he has made.

3. SALES, § 400*—*what evidence not admissible in suit for breach of warranty.* In a suit for damages for breach of warranty in the sale of an automobile, where the only warranty proved was that the car was guaranteed for life against any defect in manufacture or workmanship, evidence that the automobile was defective in design and plan of construction, and that the life of an ordinary automobile was at least two years, was incompetent.

4. SALES, § 236*—*what not warranty.* Where an automobile which was sold was warranted against defects in manufacture, an agreement by the seller to overhaul the car without cost after a trip was not part of the warranty but a special agreement.

5. SALES, § 263*—*what is extent of warranty where automobile is sold.* Where an automobile is warranted against any defect in "manufacture and workmanship," the word "manufacture" evidently refers to the process of converting the raw materials into finished parts for use in the automobile, and the word "workmanship" evidently refers to the character of the work done by workmen in the factory.

6. SALES, § 400*—*what evidence proper in suit for breach of warranty.* In an action for damages for breach of warranty in the sale of an automobile, warranted against defects in manufacture and workmanship, evidence tending to prove that noise in the engine and other parts was due to improper fitting of the several parts was improperly excluded.

7. SALES, § 401*—*when question for jury arises in suit for breach of warranty.* In an action for damages for breach of warranty in the sale of an automobile, warranted against defects in manufacture, evidence tending to prove that the tires were defective warranted a submission to the jury of such question.

8. PARTIES, § 31*—*what does not constitute change of parties.* Where a suit was brought against "Renault Freres Selling Branch" and it appeared that there were two corporations of the same name, and the plaintiff filed an amended statement of claim adding the words, "A New York corporation," and procured another writ which was served upon the agent of the foreign corporation, there was no change of parties, but merely a wrong service in the first place, and the amendment did not change the name of the defendant or substitute a different defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Freels v. Freels, 195 Ill. App. 119.

Emma Freels, Appellee, v. Hugo Freels, Appellant.**Gen. No. 20,848. (Not to be reported in full.)**

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOOKY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Suit for divorce by Emma Freels against Hugo Freels. The bill charged the defendant with cruelty and adultery, and alleged that he was a man of large means, with an income of \$10,000 or \$12,000 a year. The defendant, by his sworn answer to the bill, denied that he was guilty of the charges made against him, and denied that he was possessed of as much property as was stated in the bill of complaint. His answer admitted ownership of real estate valued at \$16,000, exclusive of the incumbrances thereon, however. The defendant also filed a cross-bill, accusing his wife of adultery, and it was evident from the allegations of the original bill, the answer thereto and the cross-bill, that there was a very bitter quarrel between the two. Upon a preliminary hearing as to the question of alimony *pendente lite*, the Circuit Court ordered the defendant to pay \$6 a week until the further order of the court, and \$25 solicitor's fees. The defendant failed to pay such allowance and a rule was entered to show cause why he should not be punished for contempt. At the hearing the defendant stated that he had four commissions for sales of real estate, aggregating \$200, which would become due when the sales were consummated, but that he had no money and had borrowed \$150 from his employer to meet expenses. Upon a second hearing, it appeared that one of the sales had been closed, but that his employer, instead of paying over defendant's share of the commission, had kept it to apply upon the loan above mentioned. The court evidently thought that these facts indicated an

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intention on the defendant's part to evade the order of the court, and again continued the hearing, with the statement that he must pay at least \$25 on account of alimony, or he would be committed for contempt. When the next hearing came on, the defendant claimed that he had been unable to raise more than \$10, which he offered to pay to the complainant. Thereupon the court adjudged him guilty of contempt of court and entered an order of commitment. This appeal followed.

T. F. MONAHAN, for appellant.

No appearance for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

CONTEMPT, § 70*—*when order of commitment is proper.* Evidence held to justify an order of commitment for failure to pay alimony, it appearing that the defendant could have raised the small amount involved and that the chancellor was lenient when he failed to comply with the court's order.

H. and A. Israelstam, trading as Grant Works Fair, Appellees, v. United States Casualty Company, Appellant.

Gen. No. 20,862.

1. APPEAL AND ERROR, § 199*—*what is extent of jurisdiction of Appellate Court.* The Appellate Court has no authority to declare any act of the Legislature unconstitutional and void.

2. APPEAL AND ERROR, § 624*—*what cause not transferrable.* An appeal from a judgment entered in a fourth-class case in the Municipal Court cannot be transferred to the Supreme Court.

3. APPEAL AND ERROR, § 2*—*what is nature of right of appeal.* The right of appeal is strictly statutory and can only be prosecuted when and in the manner authorized by statute.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. APPEAL AND ERROR, § 6*—*what is nature of writ of error.* A writ of error is regarded as a writ of right, requiring no statutory authorization to make it available.

5. APPEAL AND ERROR, § 38*—*what is purpose of statute giving Appellate Court jurisdiction.* The main purpose of section 8 of the Appellate Court Act (J. & A. ¶ 2968) was to give to the Appellate Courts jurisdiction over a certain class of cases of which the Supreme Court, prior to 1877, had jurisdiction, and it was not intended to confer any right of appeal in any case where that right did not already exist.

6. APPEAL AND ERROR, § 38*—*what statutes referred to appeals when Appellate Court was given jurisdiction.* At the time of the passage of the Appellate Court Act, the only "then existing law" that conferred any right of appeal was section 67 of the Practice Act of 1872, now section 91 of the Practice Act (J. & A. ¶ 8628).

7. MUNICIPAL COURT OF CHICAGO, § 10*—*what is nature of practice.* The jurisdiction and practice of the Municipal Court are essentially different from the jurisdiction and practice of city courts.

8. APPEAL AND ERROR, § 38*—*what is effect of statute as to appeals to Appellate Court.* The clause in section 8 of the Appellate Court Act (J. & A. ¶ 2968), authorizing appeals to the Appellate Court from the judgments of city courts, was not intended to refer to any city court thereafter created unless such court when organized should be substantially of the same class or grade as the city courts then in existence.

9. MUNICIPAL COURT OF CHICAGO, § 22*—*when appeal does not lie.* Neither section 8 of the Appellate Court Act (J. & A. ¶ 2968) nor any other statute gives any right of appeal to the Appellate Court from the judgments of the Municipal Court in fourth-class cases.

Appeal from the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Appeal dismissed. Opinion filed October 6, 1915.

MOSES, ROSENTHAL & KENNEDY, for appellant;
WALTER BACHRACH, of counsel.

ROSE, SYMMES & KIRKLAND and JOHN L. FOGLE, for appellees.

MR. JUSTICE FITCH delivered the opinion of the court.

Appellees brought suit in the Municipal Court against appellant upon a burglary-insurance policy,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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claiming that merchandise valued at \$999, covered by such insurance policy, had been stolen from their dry goods store. The suit was brought as a fourth-class case, in contract. Upon a trial before the court without a jury, appellees recovered a judgment for \$839.16, whereupon appellant prayed for and was allowed an appeal to this court upon filing a bond for \$1,200, which was filed and approved by the trial court. After the filing of the transcript of the record in this court, appellees moved to dismiss the appeal upon the ground that there is no statute authorizing an appeal (as distinguished from a writ of error) in such cases.

In support of the motion, appellees cite section 23 of the Municipal Court Act (J. & A. ¶ 3335) which, so far as it bears upon the present motion, reads as follows: "That the final orders and judgments of the Municipal Court in cases of the fourth class * * * shall be reviewed *by writ of error only*." Appellees claim that this is the only provision of any statute in this State which authorizes any court to review the final judgments of the Municipal Court in fourth-class cases, and therefore contend that this court is without jurisdiction to entertain the present appeal. To this, appellant replies that the right of appeal to this court from the final judgments of the Municipal Courts in such cases is not dependent upon the Municipal Court Act, but is given by section 8 of the Appellate Court Act (J. & A. ¶ 2968), and reaffirmed by sections 91 and 118 of the present Practice Act (J. & A. §§ 8628, 8655), and that if the above quoted provision of section 23 of the Municipal Court Act is to be given its literal meaning, it violates section 29 of article VI of the Constitution by destroying the uniform operation of the laws relating to the jurisdiction of this court, and is therefore void and of no effect.

It has been repeatedly held that this court has no authority to declare any act of the Legislature unconstitutional and void. Where the validity of a statute is

questioned for the first time in this court, we must take the law as we find it upon the statute books, unless it is a proper case to be transferred to the Supreme Court for decision, or unless the Supreme Court has already declared the statute in question unconstitutional, in which latter case it is our duty to follow the law as laid down by the Supreme Court. If an *appeal* lies in this case to any court, it was properly brought to this court. Hence, it cannot be transferred to the Supreme Court. Nor has the particular portion of section 23 above quoted ever been held to be unconstitutional, although most of the rest of that section has been. If, therefore, it be true that there is no statute authorizing an appeal to this court in such cases, then it is our duty, as we view it, to give effect to that portion of section 23 above quoted, even if we should be of the opinion that it is unconstitutional.

The right of appeal is strictly a statutory one. It has no existence apart from the statute, and can only be prosecuted when and in the manner authorized by statute. *Tedrick v. Wells*, 152 Ill. 214, 217; *Haines v. People*, 97 Ill. 161; *Hesing v. Attorney General*, 104 Ill. 292, 295; *Steger v. Steger*, 165 Ill. 579, 581; *Keokuk & H. Bridge Co. v. People*, 185 Ill. 276.

A writ of error, on the other hand, is regarded in this State as a writ of right, requiring no statutory authorization to make it available. In *Haines v. People*, 97 Ill. 161, our Supreme Court, after a review of the decisions in this State, upon the subject of the right to sue out writs of error, said: "From this review of the authorities it is clear that a writ of error lies in this State from either this court or the Appellate Court to all inferior courts of record, for the purpose of reviewing their final determinations in all cases involving property rights or personal liberty, where no appeal is given from such inferior court of record to some intermediate court or to this court. And furthermore, that this right exists independently of any statu-

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tory or constitutional provisions, by force of the common law, in all cases in which the jurisdiction of such inferior court is exercised according to the course of the common law. And in the latter class of cases the writ lies to the Circuit Courts, whether an appeal is given or not. Where an appeal is given it is to be regarded as merely cumulative."

Keeping clearly in mind this distinction between the right of appeal and the right to sue out a writ of error, viz., that the former is purely a statutory right, while the latter exists independently of the statutes, it manifestly becomes necessary to examine the several statutes purporting to give a right of appeal to this court—since that is the right claimed in this case—in order to ascertain to what extent and in what cases that right has been granted in this State. For a clearer understanding of such statutes, a brief reference to certain constitutional provisions is also necessary. These constitutional provisions are contained in article VI of the Constitution of 1870. Section 1 of that article provides that the judicial powers of the State, except as by that article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, justices of the peace, police magistrates, "and such courts as may be created by law in and for cities and incorporated towns." Section 2 provides that the Supreme Court shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, "and appellate jurisdiction in all other cases." Section 11 provides that after the year 1874, Appellate Courts of uniform organization and jurisdiction may be created in districts formed for that purpose, "to which such appeals and writs of error as the general assembly may provide, may be prosecuted from Circuit and other courts." Section 12 provides that the Circuit Courts shall have original jurisdiction "of all causes in law and equity."

In pursuance of the provisions above mentioned contained in section 11 of article VI of the Constitution, the Legislature passed an act in 1877 establishing Appellate Courts. Section 8 of that Act (J. & A. ¶2968), as originally enacted, so far as it affects the present contentions, was as follows: "The said Appellate Courts created by this act shall exercise appellate jurisdiction only, and have jurisdiction of all matters of appeal, or writs of error from the final judgments, orders or decrees of any of the circuit courts, or the Superior Court of Cook County, or from the city courts in any suit or proceeding at law or in chancery, other than criminal cases, and cases involving a franchise or freehold or the validity of a statute. Appeals and writs of error shall lie from the final orders, judgments or decrees of the circuit and city courts, and from the Superior Court of Cook county directly to the Supreme court, in all criminal cases and in cases involving a franchise or freehold or the validity of a statute."

It is apparent from this language that the main purpose of section 8 of the Appellate Court Act was to give to the Appellate Courts jurisdiction over a certain class of cases of which the Supreme Court, prior to 1877, had jurisdiction; that is, to divide the jurisdiction then exercised solely by the Supreme Court so that certain cases formerly reviewable by the Supreme Court could thereafter be reviewed by the Appellate Court. It was not intended by that section to confer any right of appeal in any case where that right did not already exist, but merely to prescribe what appeals and what writs of error, *prosecuted under laws then existing*, should be heard by the Appellate Court instead of by the Supreme Court. That such was the purpose and effect of that section was declared by the Supreme Court in the case of *Ingraham v. People*, 94 Ill. 428. In that case an appeal was taken to the Supreme Court in a criminal case, and the question

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arose whether section 8 of the Appellate Court Act or section 88 of the Practice Act (J. & A. ¶ 8625) then in force (which contained similar language) authorized *an appeal* in a criminal case. The Supreme Court dismissed the appeal, saying: "We do not construe those sections as *giving a right of appeal* in a criminal case, but only as allowing appeals and writs of error to this court in those several enumerated cases, according as appeals and writs of error lay in said cases, respectively, *under the then existing laws.* * * * They were provisions *merely regulating* appeals and writs of error as between the Appellate and Supreme Courts, prescribing to which particular court they were to be taken. *It was not the purpose to give a new right of appeal in any case in which an appeal had not before been given.*" (Italics ours.)

What, then, were "the existing laws" upon the subject of appeals that were in force in 1877?

Section 67 of the Practice Act of 1872 provided that "Appeals from all circuit courts and from the superior court of Cook county, may be taken to the supreme court from all final judgments, decrees and orders: *Provided*, such appeals shall be prayed for and allowed at the term at which the judgment, decree or order was rendered; *And, provided*, the party praying for such appeal shall, within such time, not less than twenty days, as shall be limited by the court, give, and file in the office of the clerk of the court from which the appeal is prayed, bond, in a reasonable amount to secure the adverse party, to be fixed by the court, with sufficient security to be approved by the court." (Rev. St. 1874, ch. 110, sec. 67.)

In 1874, an act was passed entitled: "An act in relation to courts of record in cities" (Rev. St. 1874, ch. 37, p. 345), which, with some changes that are not pertinent to the present inquiry, was re-enacted in 1901 (Hurd's St. 1912, ch. 37, p. 704, J. & A. ¶ 3289 *et seq.*). Section 1 of that act provided that such courts

should have “concurrent jurisdiction with the circuit courts within the city in which the same may be, in all civil cases * * * and the course of proceedings and practice in such courts shall be the same as in the Circuit Courts, so far as may be.” Section 18 (which is the same as section 18 of the present City Court Act) provided that “appeals may be taken and writs of error prosecuted from city courts to the Supreme Court *the same as in like cases from circuit courts.*”

By an amendment passed in 1877 to the Practice Act of 1872, the first paragraph of section 67 of that Act was made to read as follows: “Appeals from and writs of error to all Circuit Courts, the Superior Court of Cook County *and city courts, and from other courts from which such appeals and writs of error may be allowed by law,* may be taken to the Appellate Courts from all final judgments, orders and decrees, except as hereinafter stated.” The exception thus referred to was contained in section 88 of the same Act, the first paragraph of which, as amended by the Act of 1877, was as follows: “Appeals from and writs of error to Circuit Courts, and the superior courts of Cook county, and city courts, in all criminal cases and cases in which a franchise or freehold, or the validity of a statute is involved, shall be taken directly to the Supreme Court in case the party appealing or prosecuting such writ of error shall so elect, excepting in cases of chancery.” This portion of said section 88 was further amended in 1879, so as to read as follows: “Appeals from and writs of error to circuit courts, the superior court of Cook county, the criminal court of Cook county, county courts and city courts in all criminal cases, below the grade of felony, shall be taken directly to the appellate court, and in all criminal cases above the grade of misdemeanors and cases in which a franchise or freehold or the validity of a statute or construction of the constitution is involved, and in all cases relating to revenue or in which the

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State is interested as a party or otherwise, shall be taken directly to the Supreme Court." It was this section, as thus amended, that was before the Supreme Court in the *Ingraham* case, *supra*, in which case, as above stated, it was held that neither section 8 of the Appellate Court Act nor said section 88, as amended in 1879, was intended to give any new right of appeal where none existed before, but both sections were intended merely to regulate such appeals and writs of error as could be prosecuted "*under the then existing laws.*" Said section 88, with certain changes not affecting the present question, was re-enacted in the revision of the Practice Act in 1907, which is now in force.

In addition to the right of appeal conferred by section 67 of the Practice Act of 1872, as amended in 1877, above quoted, there were also in force at the time the Appellate Court Act was passed, divers special statutory provisions authorizing appeals to the Supreme Court in certain special proceedings (such as condemnation proceedings, drainage cases, attachment cases, forcible detainer cases, special assessment proceedings, and others), which it is unnecessary to set forth in this opinion, as none of such special provisions has any bearing upon the question here involved, further than to show that it has always been the practice of the Legislature to grant the right of appeal *in express terms* whenever that right, as distinguished from the common-law right to prosecute a writ of error, was intended to be given.

In 1887, section 8 of the Appellate Court Act was amended by inserting therein after the words "Superior Court of Cook County," the words "or county courts," and after the words "other than criminal cases," the words "not misdemeanors." The addition of these words is of no importance in this inquiry, as the right of appeal from the judgments of

county courts, and in cases of misdemeanors, is not here involved.

In 1907, the Practice Act of 1872 was revised, and by that revision, section 67 of the Act of 1872 was rewritten and is now embodied in section 91 of the present Practice Act. Said section 91 is as follows: "Appeals shall lie to and writs of error from the appellate or supreme courts *as may be allowed by law*, to review the final judgments, orders or decrees of any of the circuit courts, the superior court of Cook county, the county courts or the city courts and other courts from which appeals and to which writs of error may be allowed by law, in any suit or proceeding at law or in chancery. Appeals or writs of error in this section allowed shall be subject to the limitations by this Act provided and to the conditions imposed by law" (5 J. & A. ¶8628). This language does not differ, in any essential particular, from that of section 67 of the Practice Act of 1872, as amended in 1877. Section 88 of the prior Practice Act became section 118 in the revision of 1907 (J. & A. ¶8625), and that part of that section which is material to the question before us is identical with section 88 as amended in 1879, hereinabove quoted.

In *Damon v. Barker*, 239 Ill. 637, it was held that section 118 of the present Practice Act *does not give any right of appeal in any case*, but merely directs to what court appeals shall be prosecuted when authorized by other sections of the statute, thereby following the previous decision, as to that section in *Ingraham v. People, supra*. This ruling was followed in *Myers v. Newcomb Drainage Dist.*, 245 Ill. 140. In the opinion filed in the *Damon* case, *supra*, the Supreme Court used some language from which it might appear that section 91 of the Practice Act of 1907 is the only statute now in force giving the right of appeal, but in the latter case, this language was qualified in the following manner, viz.: "The right of appeal or writ of error, *in so*

Israelstam v. U. S. Casualty Co., 195 Ill. App. 120.

far as the right is granted by the Practice Act, is conferred by section 91 of the act."

From this review of the statutory provisions that were in force at the time the Appellate Court Act was passed, it will appear that the only "then existing law" that *conferred* any right of appeal, as distinguished from the right to sue out a writ of error, to review the final judgments of inferior courts in ordinary actions at law, was the provision in section 67 of the Practice Act of 1872, as amended in 1877, above quoted, and which has now become section 91 of the present Practice Act. By that section, the right of appeal was and is limited to appeals from the final judgments, orders and decrees of Circuit Courts, the Superior Court of Cook county, city courts and "other courts from which such appeals may be allowed by law."

Appellant does not claim that there is or ever was a statute which, in express terms, purported to give any right of appeal to this court from the judgments of the Municipal Court in fourth-class cases, but contends that the words "city court," as used in the acts above mentioned, and especially as used in section 8 of the Appellate Court Act, includes the Municipal Court of Chicago. It is true that it has been held that the Municipal Court of Chicago is one of the courts which section 1 of article VI of the Constitution provides may be created by law in and for cities and incorporated towns (*People v. Olson*, 245 Ill. 288). But the Municipal Court was not organized under the City Court Act above mentioned, and the jurisdiction and practice of the Municipal Court are essentially different from the jurisdiction and practice of city courts organized under the City Court Act. Manifestly, if, as was held in *Ingraham v. People*, *supra*, section 8 of the Appellate Court Act was not intended to give any right of appeal that had not been given before that act was passed, then the clause in that section which

authorizes appeals to this court from the judgments of city courts could not have been intended to refer to any city court thereafter created, unless such court, when organized, should be substantially of the same class or grade as the city courts then in existence. That the Municipal Court of Chicago is wholly unlike the city courts referred to in section 8 of the Appellate Court seems too clear for argument:

In *Lott v. Davis*, 264 Ill. 272, it was said: "If the Municipal Court is considered in its entirety it is impossible to assign to it a place identical with the grade or class of any other court which now exists or ever has existed. The court goes under the generic name of a city court, but it belongs to a specific class different from the city courts created under the general City Court Act, and is created, not as a part of the judicial department of the State at large, but as a local court of the city for the purpose of administering the law within the city." In the same case, the similarity that exists between the jurisdiction and practice of the Municipal Court in fourth-class cases and the jurisdiction and practice that formerly obtained before the police magistrates and justices of the peace of the city of Chicago is pointed out, and it was held, for that reason, that in the exercise of its jurisdiction in fourth-class cases, the Municipal Court of Chicago is not a court of the same class or grade as the Circuit Court. By the same reasoning it necessarily follows that in the exercise of its jurisdiction in fourth-class cases, the Municipal Court is not a court of the same class or grade as city courts organized under the general City Court Act; for the City Court Act provides that city courts organized thereunder shall have "concurrent jurisdiction with the Circuit Courts" within the cities in which they are organized, and that the practice in such courts shall be the same as in the Circuit Courts.

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We presume that no one would contend that an appeal from a judgment of a police magistrate is in the same category or must be treated by the Legislature in the same manner as an appeal from a judgment of a city court in a similar case, even though the amount involved in each was identical; nor would it be seriously contended, we think, that an appeal from a judgment of a justice of the peace in an action *ex contractu* could be taken to the Appellate Court under any law that has ever been passed in this State, even though the right of appeal to this court from the final judgments of a Circuit Court or city court in precisely the same kind of a case is conferred by existing laws. The character of the jurisdiction that is vested in the Municipal Court of Chicago in fourth-class cases, and the manner in which such cases are instituted and carried on in that court, would seem to be quite as sufficient a reason for placing such cases in a class by themselves, so far as the right of appeal to this court is concerned, as the manner in which the same kind of suits were formerly instituted and carried on before the justices of the peace of the city of Chicago, whose jurisdiction is now exercised by the Municipal Court. If the Legislature had seen fit to authorize appeals from the judgments of the Municipal Court in fourth-class cases to the Circuit Court, it would have dealt with such cases in precisely the same manner as it had previously dealt with cases of the same character in the justices' courts. It saw fit, however, to provide that the final judgments of that court in such cases may be reviewed by writ of error from this court.

Since, as we think we have shown above, the only statutes which authorize appeals to this court from the judgments of city courts refer to courts whose jurisdiction and practice are radically different from that of the Municipal Court of Chicago, it would seem to follow that such statutes can have no proper application to appeals from the judgments of the Municipal

Bosco v. Boston Store of Chicago, 195 Ill. App. 133.

Court of Chicago in fourth-class cases; and since there are no such cases in city courts organized under the general City Court Act as fourth-class cases, that is, as the cases so denominated in the Municipal Court of Chicago are instituted and carried on in city courts in an entirely different manner, we are at a loss to see how the mere fact that the Legislature has seen fit to recognize this distinction, by providing that the judgments of the Municipal Court in fourth-class cases shall be reviewed in this court by writ of error only, affects the uniformity of the jurisdiction and practice of this court.

Our conclusion upon the whole question presented by this motion is that neither section 8 of the Appellate Court Act, nor any other statute in this State in force at this time, gives any right of appeal to this court from the judgments of the Municipal Court in fourth-class cases. The motion to dismiss the appeal will therefore be allowed.

Appeal dismissed.

Catherine Bosco by Angelo Bosco, Appellee, v. Boston Store of Chicago, Appellant.

Gen. No. 20,884. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action by Catherine Bosco, a minor, by her next friend, Angelo Bosco, plaintiff, against the Boston Store of Chicago, a corporation, defendant, in the Superior Court of Cook county, to recover for personal injuries caused by being struck by an auto-truck.

Bosco v. Boston Store of Chicago, 195 Ill. App. 133.

From a judgment for plaintiff for \$12,000, defendant appeals.

The suit was originally brought against the Boston Store and the Grabowsky Power Wagon Company, a corporation. The declaration charged that at the time of the accident the Grabowsky Power Wagon Company, a dealer in auto-trucks, was operating, driving and managing certain auto-trucks along the public streets of the city of Chicago "in conjunction with the defendant Boston Store"; that while the plaintiff, a girl seven years old, was crossing Madison street at the intersection of Paulina street, and was in the exercise of such care and caution for her own safety as might be expected of a child of her tender years, the defendants so negligently drove one of their auto-trucks that through their negligence the auto-truck ran into the plaintiff and threw her to the ground, causing divers serious permanent injuries. To this declaration the Boston Store filed a plea of not guilty, and three special pleas, which aver that at the time of the accident, the Boston Store did not own, manage, operate or drive the auto-truck in question, either in conjunction with the Grabowsky Power Wagon Company or otherwise, and aver that the auto-truck in question was, at the time and place of the accident, owned, operated, driven and managed by the Grabowsky Power Wagon Company. Upon the trial, the plaintiff entered a nonsuit as to the Grabowsky Power Wagon Company, and the cause proceeded as against the Boston Store alone.

MOSES, ROSENTHAL & KENNEDY, for appellant; HAMILTON MOSES and HENRY JACKSON DARBY, of counsel.

MILES J. DEVINE, for appellee; JOHN T. MURRAY, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

Pixley v. Ill. Comm. Men's Ass'n, 195 Ill. App. 135.

Abstract of the Decision.

1. NEGLIGENCE, § 186*—*when evidence sufficient to make prima facie case.* In an action to recover for personal injuries caused by being struck by an auto-truck alleged to be owned and controlled by defendant, where defendant's pleadings put in issue the fact of such ownership and control by it, such possession and control by defendant *held* proved prima facie by evidence showing that the name of defendant was painted on the outside of such truck.

2. NEGLIGENCE, § 165*—*when evidence admissible to show ownership of vehicle causing injury.* In an action to recover for personal injuries caused by being struck by an auto-truck, where defendant's pleadings put in issue the ownership and control of the truck and the control of the servant operating it at the time of the accident, *held* error to exclude evidence that such truck was in fact not owned and operated by defendant at the time of the accident, and was owned and operated by another under contract with defendant, and that the servant operating such truck at such time was the servant of such other person, as it was competent for defendant to show such facts as tending to sustain its pleadings and exonerate it from liability.

Ella A. Pixley, Appellant, v. Illinois Commercial Men's Association, Appellee.

Gen. No. 20,891. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Action by Ella A. Pixley, plaintiff, against the Illinois Commercial Men's Association, defendant, in the Municipal Court of Chicago, to recover on a certificate of insurance wherein plaintiff was designated as beneficiary.

The essential facts are undisputed. It appears that prior to his death, insured was subject to severe at-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pixley v. Ill. Comm. Men's Ass'n, 195 Ill. App. 135.

tacks of headache, and on two or three occasions, many years before his death, he had taken morphine to relieve the pain; that on Friday, September 22, 1911, he told a woman servant at his apartment that he had not been well, and was nervous; that the following morning he appeared at the apartment and said to the woman who opened the door for him, "I am awfully sick, and want to come in and go to bed"; that he also said that he did not want a doctor, but merely wanted to rest; that he went into his bedroom and shut the door, and about noon, he sent word to his wife "that he was at the apartment being taken care of, and for her not to worry"; that he ate nothing that day; that about two o'clock in the afternoon, one of his servants went to his bedroom door and asked him if he wanted anything, receiving a negative reply; that he was then standing, holding a bottle containing small white tablets; that he had two or three of the tablets in his hand, and was counting out others; that in reply to an inquiry as to what he was taking, he said it was "something to ease the pain" in his head, "some medicine he got at the drugstore"; that he asked for a glass of water, and handed the bottle containing the tablets to the woman, who took it from the room and left it in a bedroom adjoining, where it was found the next day; that about half an hour later, he became nauseated, and went into the bathroom, but returned to his bedroom a few minutes later; that about six o'clock in the evening, he came out, partly dressed, went to the kitchen; where he chatted with the woman for an hour and a half; that he said he felt better, and thought he would go to his farm; that later he came out of his bedroom dressed and with his hat and overcoat on, smoking a cigar; that he sat down and talked for another half hour, and then, saying that he felt "shaky," returned to his bedroom, undressed and went to bed; that during the night he grew worse, and in the morning two physicians were called, but

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they were unable to arouse him, and he died about eleven o'clock Sunday evening; that an autopsy was had, and the doctors making it certified "that the findings were consistent with morphine poisoning," and "that no other cause of death was found." It was stipulated in the record, however, "that the deceased died from an overdose of morphine."

From a judgment for defendant, plaintiff appeals.

BARTLETT & CHAMBERLAIN and BEACH & BEACH, for appellant.

RYAN & CONDON, for appellee; IRVIN I. LIVINGSTON, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE, § 745***—*when by-laws part of contract.* In an action to recover on a policy of insurance on the life of one who died from an overdose of morphine self-administered, where the policy makes the by-laws and application a part of the contract, it is not only necessary that the beneficiary show that the death was "accidental," as provided by the terms of the policy, but also that it fell within the provision of the by-laws limiting the insurer's liability to death caused by "external, violent or accidental means," and not within the exceptions in the by-laws and application relieving the insurer from liability, where death was caused by the "intentional or unintentional taking of poison," or while deceased was under the influence of any narcotic.

2. **INSURANCE, § 419***—*what agency of accidental death.* A death which is the result of an accident, or is unnatural implies an external and violent agency as its cause.

3. **INSURANCE, § 419***—*what constitutes accidental death.* An accidental death is one which is undesigned or unintended, the word "accidental" being, in such connection, the antithesis of "intentional."

4. **INSURANCE, § 419***—*when death accidental.* In an action to recover on a policy of insurance which provided for the payment of an indemnity upon the "accidental death" of insured, where the evidence shows that insured died from an overdose of morphine self-administered, that morphine in small quantities is not poisonous

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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but only when taken in excess, and that his taking of the overdose was unintentional, *held* that the death was "accidental."

5. **INSURANCE, § 419***—*when death by poison is by accidental means.* Where a certificate of insurance provided for payment of a prescribed indemnity in case of death caused by "external, violent and accidental means," *held* that a death due to an overdose of morphine, taken by insured without intent to cause death thereby, was within the meaning of the words quoted.

6. **INSURANCE, § 419***—*when evidence sufficient to show accidental death.* Evidence in an action to recover on an insurance policy on the life of one who died from an overdose of morphine self-administered, examined and *held* to show that deceased did not intentionally take a poisonous amount, but either acted in ignorance of the effects of morphine in general, or because he did not know that such an amount would affect him injuriously.

7. **INSURANCE, § 419***—*when death by morphine defeats recovery.* In an action to recover on a certificate of insurance, where it was stipulated that insured's death was due to "an overdose of morphine," and where it appeared that morphine was a narcotic, an overdose of which was poisonous, and that at the time of death insured was under the influence thereof, *held* that such stipulation precluded plaintiff from recovering, it appearing that the application for such insurance, signed by plaintiff, expressly excepted, as grounds of liability of defendant thereunder, such injuries as insured might receive "while under the influence of * * * narcotics, or in consequence thereof, * * * nor from intentional or unintentional taking of poison," such stipulation being necessarily construed as an admission that insured's death was due to a poisonous dose of morphine.

Samuel Rothbart, Appellee, v. Marshall Field & Company, Appellant.

Gen. No. 20,905. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. Louis BERNREUTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action by Samuel Rothbart against Marshall Field & Company to recover damages for personal injuries.

Rothbart v. Marshall Field & Co., 195 Ill. App. 138.

At the trial the defendant moved for a directed verdict at the close of the plaintiff's evidence, and also at the close of all the evidence. Both motions were denied and proper exceptions taken. A verdict for five hundred dollars was rendered and judgment being entered thereon, defendant appeals.

FRANK P. LEFFINGWELL and ROBERT J. FOLONIE, for appellant.

A. H. RANES and H. BLAISDELL, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1392*—*what question is presented by assignment of error.* An assignment of error in denying a motion for a directed verdict presents the question whether there is in the record any evidence fairly tending to prove the material averments of the declaration.

2. TRIAL, § 192*—*when denial of directed verdict is error.* In an action for personal injuries sustained by a servant while riding on top of a heavily loaded wagon, where the declaration alleged that the plaintiff was struck by a viaduct, *held* that there was no evidence fairly tending to support such declaration, and a denial of a motion to find a verdict for the defendant was error.

3. MASTER AND SERVANT, § 665*—*when admission of evidence as to cause of injury is erroneous.* In an action for personal injuries sustained by a servant while riding on top of a heavily loaded wagon, a denial of a motion to exclude statements of the plaintiff that he was hit by a viaduct was error, when it appeared that such statements were mere inferences or conclusions.

4. MASTER AND SERVANT, § 721*—*what is question for jury.* The question of the relation of fellow-servants is ordinarily for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

In re La Page's Estate v. Devine, 195 Ill. App. 140.

In re Estate of Lizzie La Page, on appeal of John La Page, Appellant, v. John F. Devine, Administrator, et al., Appellees.

Gen. No. 20,916. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PERRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Appeal from an order of distribution in the matter of the estate of Lizzie La Page, deceased, by John La Page, the defendant being John F. Devine, administrator of the estate of such Lizzie La Page.

The cause in which such decree was entered had been heard by Judge Petit of the Circuit Court, in November, 1913, and at the conclusion of the hearing he took the case under advisement, saying that when he had reached a conclusion, he would notify counsel of that fact. At some time between one and three o'clock in the afternoon of April 17, 1914, Judge Petit's minute clerk, by direction of the judge, telephoned to the offices of counsel on both sides that the court would render a decision on the following day, Saturday; and before four o'clock of the same day, counsel for defendants caused a notice, to the effect that at ten o'clock on Saturday they would ask the court to enter findings and judgment in favor of defendants, and a copy of the findings and decree, which were afterwards entered, to be served upon appellant's counsel, Herman Welk, by delivering the same to a stenographer employed by him and then in charge of his office in Chicago. It appears, however, that Mr. Welk did not personally receive word of either the telephone communication of the minute clerk or the formal notice given by defendants' counsel until the Monday following (after the term had expired), for the reason

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that before either of such notices was given on Friday afternoon he had been called to his home in Lemont by the illness of his wife, and remained there all Saturday and Sunday. The telephone message was received at his office on Friday afternoon by a real estate broker who had an office in the same suite, and the other notice was received, as above stated, by Mr. Welk's stenographer; but so far as the record shows, neither the real estate broker nor the stenographer made any attempt to notify Mr. Welk that such notices had come to them, until he returned to his office on Monday, April 20, 1914. Thereupon he made a motion to set aside and vacate the decree entered on April 18, 1914, filing with his notice of such motion the affidavits of himself and of the stenographer as to the facts of which they had knowledge. When this motion to vacate was called up before Judge Petit, on April 21, 1914, oral statements on both sides were evidently made by counsel, and also by the court, and the clerk of the court, as to what had occurred on Friday and Saturday. The bill of exceptions shows that after the affidavits and oral statements of defendants' counsel had been heard, the court ordered that such oral statements "should be incorporated in affidavits and presented afterwards *nunc pro tunc* as of April 21, 1914, to form a part of the bill of exceptions" (which was in fact done, and the same filed on May 15, 1914), and then overruled the motion to vacate the decree. From this ruling, or order, John La Page appeals.

HERMAN WELK and IRWIN & STAMPFLI, for appellant;
FREDERIC C. ELLIS, CHARLES C. SPENCER and JESSE WILCOX, of counsel.

F. F. & J. V. NORCROSS and ADAMS & WINNEN, for appellees;
McDUFFEE & KEENAN and WILLIAM MULVANEY, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

Novy v. Louis B. Rysdon Co., 195 Ill. App. 142.

Abstract of the Decision.

1. **COURTS, § 31***—*what is effect of rule of court.* A rule of the Circuit Court requiring notice of a motion to be served upon the opposite party or his attorney of record, "before 4 p. m. of the business day next preceding the day mentioned in the notice for calling up, either personally or by leaving a copy thereof at his office with some person in charge thereof on his behalf," plainly provides that service is sufficient if a copy of the notice is left in apt time with some employee in charge of the office of the attorney to whom the notice is directed.

2. **JUDGMENT, § 272***—*when motion in nature of error coram nobis is not available.* A decision of the Circuit Court construing one of its rules, if erroneous, is erroneous as to an error of law, and such decision cannot be corrected upon a motion in the nature of a writ of error *coram nobis*.

3. **COURTS, § 34***—*what is attorney's duty as to rules of court.* Attorneys at law are bound to take notice of the rules of court.

4. **JUDGMENT, § 236***—*when judgment should be entered.* The practice of entering a final judgment or decree on the last day of the term, in the absence of council, is not to be commended, but a judgment so entered is not for that reason alone erroneous.

Theodore Novy, Appellee, v. Louis B. Rysdon Company, Appellant.

Gen. No. 20,940. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. Rehearing denied October 15, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action for damages for personal injuries by Theodore Novy against Louis S. Rysdon Company. It appeared that defendant had a contract to install twenty skylights in the roof of a one-story car barn at Rockford, Illinois. After three of them had been installed by an employee named Malmstrom, defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Novy v. Louis B. Rysdon Co., 195 Ill. App. 142.

ant, desiring to use Malmstrom's services elsewhere, directed the plaintiff Novy to go to Rockford and do the remainder of the work. Plaintiff was an experienced sheet metal worker, and the only instructions given him by defendant's president, Louis Rysdon, who employed him, were to go to Rockford with Malmstrom, who would show him what was to be done. There was evidence tending to prove that defendant delegated to Malmstrom the duty of furnishing to plaintiff suitable hoisting apparatus for his use, and that after it was set up, although Malmstrom said he did not like the way it worked, and that "it did not catch right," he nevertheless directed plaintiff to use it and "get through as quickly as he could."

After Malmstrom left, two laborers used the derrick until about 2:30 in the afternoon, in hoisting the material to the roof. Then they fastened a barrel of putty weighing five hundred pounds to the cable, and attempted to hoist it. When they had raised it about fifteen feet above the ground, they called to plaintiff, who was working at another part of the roof, to "come over and give them a hand." Plaintiff took hold of one of the drum handles while the laborers held the other. By their combined efforts, the handles were turned several times, when something gave way and plaintiff was thrown from the roof to the ground. He sustained a compound fracture of both bones of the left leg above the ankle, resulting in a stiff ankle and deformed foot, with two and one-half inches shortening of the leg.

At the trial a judgment of \$8,000 was rendered in favor of the plaintiff, and the defendant appeals.

RALPH F. POTTER, for appellant.

SMEJKAL, KLENHA & KRASA, for appellee; JOSEPH J. KROUPA, of counsel.

MR. JUSTICE FITCH delivered the opinion of the court.

Lenihan v. Chicago Railways Co., 195 Ill. App. 144.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1411***—*when verdict will not be disturbed on appeal.* Where the evidence upon questions of pure fact is conflicting, the Appellate Court is not authorized to reverse the finding of the jury and the judgment of the trial court, unless after an examination of all the evidence it appears that the verdict is manifestly contrary to the preponderance of the evidence.

2. **MASTER AND SERVANT, § 166***—*when servant need not inspect appliances.* In the absence of notice that a pawl is defective, a servant has the right to rely upon the inspection of such hoisting apparatus by the representative of the master to whom has been delegated the duty of furnishing the appliance, and such servant is not required to inspect the appliance.

3. **MASTER AND SERVANT, § 363***—*when servant does not assume risk of injury.* Where evidence in an action for injuries showed that a defective derrick was used successfully for several hours, the danger arising from the use of such derrick was not so obvious that a reasonably prudent person would have refused to use it, and a servant in obeying the direction of the representative of the master to use the apparatus did not assume the risk of injury.

4. **MASTER AND SERVANT, § 623***—*what evidence as to defective appliance admissible.* In an action for injuries to a servant caused by a derrick, where some evidence tended to show that the derrick was in the same condition two days after the accident as at the time, there was no reversible error in permitting a witness to testify as to its condition on such second day.

5. **MASTER AND SERVANT, § 777***—*when instruction properly refused as misleading.* In an action for personal injuries sustained by a servant by reason of a defective derrick, an instruction which might have been understood as announcing the view that it was the duty of the servant to inspect the appliance for defects was properly refused as misleading, as such duty under the evidence was that of the representative of the master.

Rhoda Lenihan, Administratrix, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 20,952. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in the Branch Appellate

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lenihan v. Chicago Railways Co., 195 Ill. App. 144.

Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action brought by Rhoda Lenihan, as administratrix of the estate of John Lenihan, deceased, against Chicago Railways Company for negligently causing the death of deceased.

It appeared that defendant operated a double-track street car line on Western avenue in Chicago, which street runs north and south, and that on a certain day between six and seven o'clock in the morning, John Lenihan was crossing such avenue at the intersection of Polk street. There was some evidence that there was a wind blowing from the south, accompanied by snow and rain, and one of defendant's street cars, going south on the west track on Western avenue, was approaching the intersection of Polk street, at a speed variously estimated by the witnesses at from seven to twenty miles an hour. Lenihan stepped off the sidewalk at the southeast corner of Polk street and Western avenue, and walked southwesterly towards the sidewalk at the northwest corner of said streets, thereby apparently following the most direct course from one sidewalk to the other. As he reached the west rail of the west car track, he was struck by the street car and killed. Whether he saw or heard the car coming is not known. There was evidence tending to prove that although the motorman saw Lenihan when the latter first started to cross the street, the car being then about one hundred feet away, yet he merely sounded his gong, without applying the brakes, and made no effort to stop the car until Lenihan stepped directly in front of it, about twenty or twenty-five feet away.

At the trial a judgment of \$2,000 was entered in favor of the plaintiff, and the defendant appeals.

Welch v. Chicago City Railway Co., 195 Ill. App. 146.

CHARLES L. MAHONY and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

SAMUEL B. KING, WARWICK A. SHAW and LEWIS C. BALL, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 142*—*when instruction in action for injuries to a pedestrian is erroneous.* In an action for the death of a pedestrian struck by a street car, an instruction stating that if the jury believed from the evidence that the motorman saw the deceased "in time to have slowed up his car and have prevented said collision," then it was the absolute duty of the motorman, as a matter of law, to do so, and that his failure to act in that particular manner in this case was such negligence, as a matter of law, "as would render the defendant liable" in damages, provided the motorman's failure to so act was the cause of the accident, and that deceased was in the exercise of due care for his own safety is erroneous.

2. STREET RAILROADS, § 64*—*what is duty of operator of street car.* It is the duty of a motorman operating a street car to exercise ordinary and reasonable care, under the circumstances, to avoid a collision with a pedestrian at a crossing, and what is ordinary and reasonable care is a question of fact for the jury.

3. STREET RAILROADS, § 141*—*when instruction invades province of jury.* In an action for personal injuries to a pedestrian caused by a street car, it is an invasion of the province of the jury to tell them that any particular act or omission is such negligence as will make the defendant liable as a matter of law.

Ninian H. Welch, Administrator, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 20,962.

1. STREET RAILROADS, § 64*—*what constitutes negligence at crossing.* To drive an electric car at a speed which makes it impossible to stop within less than twenty-five feet, directly alongside and past another car which is standing at a public street crossing unloading

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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passengers is negligence, since under such circumstances a motorman should proceed slowly and cautiously and have his car under such control that it could be stopped at once.

2. **STREET RAILROADS, § 64***—*what may be relied on in operation of car at crossing.* In passing behind a street car standing on one of two parallel tracks, the view of the car approaching from the opposite direction on the other track is obstructed by the standing car until the distance from a place of safety to one of danger is but a step or two, and in such case the pedestrian or passenger has a right to rely upon his sense of hearing as well as of sight and to expect the approaching car to give warning of its approach, and to observe city ordinances as to speed.

3. **APPEAL AND ERROR, § 1411***—*when Appellate Court not justified in disturbing verdict of jury.* Where there is sufficient evidence upon an issue of fact to warrant its submission to the jury, the Appellate Court is not justified in disturbing the verdict of the jury upon that issue unless such verdict is clearly and manifestly against the weight of the evidence.

4. **APPEAL AND ERROR, § 1411***—*what is duty of court on appeal as to verdict.* Where it is assigned that a verdict is against the weight of the evidence, it is the duty of the Appellate Court to examine and weigh the evidence, but that duty does not permit the court to substitute its judgment for that of the jury on a pure question of fact, unless the conclusion of the jury is palpably wrong.

5. **APPEAL AND ERROR, § 1411***—*when verdict will not be disturbed on appeal.* Verdict as to negligence of street railway or as to contributory negligence of person struck by car while passing behind another standing car, *held* not manifestly against the weight of evidence.

6. **INSTRUCTIONS, § 89**—*when instruction as to number of witnesses not erroneous.* An instruction, stating that "the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side does not necessarily alone determine the preponderance of the evidence is on the side for which the larger number testified," and also stating the matters which the jury might take into consideration in determining the preponderance of the evidence, without again referring to the number of witnesses, is not prejudicially erroneous, under the facts of this case.

Appeal from the Circuit Court of Cook county; the Hon. ADELOP J. PERRY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

FRANK L. KRIETE and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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JOHN A. BLOOMINGSTON, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

By this appeal the Chicago City Railway Company, appellant, seeks to have reversed a judgment entered against it in the Circuit Court of Cook county, for \$1,267.67, in favor of appellee; the administrator of the estate of Karolina Jankus, deceased, who was struck and killed by one of appellant's street cars at the intersection of Wentworth avenue and Sixty-second street in the city of Chicago, about 6:30 a. m., on September 20, 1911. As grounds for reversal, appellant claims, first, that the deceased was guilty of contributory negligence; second, that the verdict is against the manifest weight of the evidence; and third, that the court gave an improper instruction on behalf of appellee.

The deceased was a Russian, twenty-five years of age at the time of her death, unmarried, and, prior to her death, was living with her sister on Paulina street, near Forty-fifth street, in Chicago. She was working in a factory located on LaSalle street, just north of Sixty-second street. Wentworth avenue, Paulina street and LaSalle street run north and south, and LaSalle street at Sixty-second street is a block east of Wentworth avenue. Appellant operates a double-track electric street car line on Wentworth avenue. The west track is used for southbound cars and the east track for northbound cars. These tracks are five feet apart and cars pass about a foot from each other. On the morning of the accident Miss Jankus, in going to her work, boarded one of appellant's street cars on Wentworth avenue in the neighborhood of her home. The car was well filled with passengers, among whom were several who were working in the same factory with Miss Jankus. The car in which she was riding stopped to let off passengers at or near the south crossing of Sixty-second street. Miss Jankus was the

first to alight. She stepped down from the rear platform, and walked around the back end of the car to go east on Sixty-second street. As she stepped from behind the car that was standing at the crossing she was struck by another car coming north on the adjoining track, and was thrown to the ground. Her clothing was caught in the wheels of the front truck, and she was dragged along until the car stopped north of the north crossing. Three witnesses, who were immediately behind her when she was hit by the northbound car, testified that they did not hear any bell ringing on that car before the accident happened, that when the deceased was about on the east rail of the west track she turned her head and looked to the south, then moved forward two steps, and was struck by the car on the other track. The motorman of the northbound car testified that the deceased was hit by the "grab handle" which is located just south of the front corner of the car; but all the other witnesses who saw her at the moment of the collision testified that she was struck by the front end of the street car, near the northwest corner of the car. The motorman also testified that he was sounding his gong; that he had shut off the power of his motor before he reached the crossing, and was "drifting six or seven miles an hour with no power on"; that when he saw Miss Jankus step from behind the other car he applied the brakes and reversed the motor, coming to a stop about thirty-five feet away; that when he first saw the deceased she was ten or twelve feet away from him; that he could not stop his car within that distance when going six miles an hour; that in order to stop a car in that distance it "would have to be going about two or three miles an hour"; and that "with the reverse lever, going at a mile and a half or two miles an hour, you could stop it in from six to seven feet, or maybe a couple of feet less." There was other evidence tending to prove that the northbound car was moving at a much higher rate

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of speed than seven miles an hour; but whatever the speed was, the motorman admitted that he did not have his car under such control that he could have stopped it in less than twenty-five feet.

From this evidence, it seems clear to us that if the motorman had exercised ordinary care, under the circumstances, the accident would not have occurred. To drive an electric car at a speed which makes it impossible to stop within less than twenty-five feet, directly alongside and past another car which is standing at a public street crossing unloading passengers, is, to say the least, not a reasonably prudent thing to do. All reasonable minds must agree that ordinary care, under such circumstances, requires a motorman to proceed slowly and cautiously, and to have his car under such control that he could stop it at once, if necessary. The evidence shows that the cars passed so close to each other that the deceased could not see the approaching car until it was nearly upon her. It does not appear from the evidence that she was running, or was unmindful of her surroundings. On the contrary, the evidence tends to prove that just before she stepped in front of the northbound car she looked to the south and listened for the approach of a car from that direction. Seeing or hearing nothing, she advanced two steps and was killed.

Several cases, decided by another branch of this court, have been cited by appellant's counsel, which seem to hold that under circumstances somewhat similar to those shown by the evidence in this case, the failure of the person injured to "stop, look and listen" before stepping from one of two parallel tracks to the other is such contributory negligence as will preclude a recovery. None of such cases holds in terms that under such circumstances the failure of the person injured to stop, look and listen makes him guilty of negligence *per se*, and as a matter of law, but in

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each of such cases the conclusion reached by the court is a finding of fact from the evidence.

In several of such cases, the case of *Illinois Cent. R. Co. v. Batson*, 81 Ill. App. 142, is cited with approval. In that case, the court, after quoting from sundry other cases in this State, said: "These authorities, and many others that might be cited, warrant the statement that while a failure to look if a train is approaching is not in law negligence *per se*, it is negligence in fact, *if there are no conditions or circumstances which excuse looking*. And a jury, without evidence of conditions or circumstances which excuse looking, when looking would disclose the danger, is not warranted in finding that such failure to look is not negligence." Conceding this to be a fairly accurate statement of the rule in such cases, it will be seen that if in any case similar to that here involved, there is evidence of conditions or circumstances which excuse looking, when looking would have disclosed the danger, then the mere failure to look is not decisive upon the question of contributory negligence, either as a question of fact or as a question of law.

In passing behind a street car standing on one of two parallel tracks which are as near to each other as those on Wentworth avenue, the view of a car approaching from the opposite direction on the other track is obstructed by the standing car until the distance from a place of safety to one of danger is but a step or two. In the recent case of *Stack v. East St. Louis & S. Ry. Co.*, 245 Ill. 308, 1 N. C. C. A. 687, the plaintiff stepped off the rear platform of a car, passed around the back end of the car, and was struck by another car going in the opposite direction. There was evidence tending to prove that the car which struck the deceased was running at an excessive rate of speed, that no gong was sounded, and that the car which struck him was within two or three feet of him as he came from behind the other car. After stating these conditions and circum-

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stances, the court said: "It was possible for him (the plaintiff) by the exercise of a sufficiently high degree of care, to have discovered the eastbound car and not have got in its way. *He had, however, a right to rely upon his sense of hearing as well as of sight, and to expect the appellant, in running its car past another car stopped for the discharge of passengers, to give warning and to observe the ordinance of the city in respect to speed.* While the negligence of the appellant did not relieve the deceased from the necessity of exercising care for his own safety, it is to be considered in determining whether his conduct was such as an ordinarily prudent man might have adopted under the circumstances, and that question was properly submitted to the jury." (Italics ours.)

It has been repeatedly held—so often, in fact, that a citation of authority is unnecessary—that where there is sufficient evidence upon any issue of fact in any case to warrant its submission to the jury, the Appellate Court is not justified in disturbing the verdict of the jury upon that issue, unless the verdict is clearly and manifestly against the weight of the evidence. Where it is assigned for error in this court that the verdict is manifestly against the weight of the evidence, it is the duty of this court to examine and weigh the evidence; but this duty does not require nor permit this court to substitute its judgment for that of the jury on a pure question of fact, unless the court can say that the conclusion reached by the jury is palpably wrong. In this case, the deceased was at a public crossing. Her rights there were equal to those of appellant. She was required to exercise ordinary care for her own safety, and appellant was likewise required to exercise ordinary care in the operation of its street cars to avoid injury to her. The care required of the deceased was no greater than that required of appellant. If appellant's motorman had been exercising ordinary care, the accident would not have hap-

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pened. If the deceased had used extraordinary care, doubtless the accident would not have happened. She had a right, however, as is said in the *Stack* case, *supra*, to rely upon her sense of hearing as well as of sight, and to expect the appellant, in running its cars past another car stopped for the discharge of passengers, to give warning and to proceed with such speed as the circumstances reasonably required.

We therefore conclude that upon the facts of this case the verdict of the jury is not manifestly against the weight of the evidence, either as to the negligence of the defendant or as to the alleged contributory negligence of the deceased.

Complaint is also made that the court erred in giving an instruction, in which, after stating that "the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side does not necessarily alone determine the preponderance of the evidence is on the side for which the larger number testified," the matters which the jury may take into consideration in determining the preponderance of the evidence were enumerated, without again referring to the number of witnesses. It is true that more witnesses testified on the side of appellant than on the side of appellee, but an examination of their evidence discloses the fact that practically the same number of witnesses testified on each side as to the essential and important facts regarding the accident. For the reasons stated by Mr. Justice Scanlan in the recent opinion in the case of *Christ v. Chicago Rys. Co.*, 191 Ill. App. 69, we think the giving of this instruction was not prejudicial error in this case.

For the reasons indicated, the judgment of the Circuit Court will be affirmed.

Affirmed.

Damiani v. Proulx, 195 Ill. App. 154.

**Joseph Damiani et al., Executors, Defendants in Error,
v. Theodore Proulx, Plaintiff in Error.**

Gen. No. 20,491. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Suit by Joseph Damiani, Frank De Trana and Alexander De Trana, executors of the last will and testament of Joseph De Trana, deceased, against Theodore Proulx, to recover upon a promissory note executed by defendant, payable to the order of the said Joseph De Trana, now deceased. The statement of claim set forth that plaintiffs were the executors of the last will and testament of the said Joseph De Trana, deceased, duly appointed by the Probate Court of Cook county. It also set out the note in full, a copy of which was attached to and made a part thereof. To this statement of claim defendant, who is an attorney of law, filed an affidavit of merits wherein he did not deny the execution of the said note, but claimed to have paid on said note the sum of \$50; and further, that there was due him from the said De Trana, by reason of legal services rendered and disbursements advanced, the sum of \$199. Also, on the same date defendant filed a "statement and affidavit of claim on set-off," which was but a repetition of his affidavit of merits.

No affidavit of merits was filed by the plaintiffs to this statement and affidavit of claim on set-off.

On the trial below, before the court without a jury, the court found the issues against the defendant and assessed the plaintiffs' damages in the sum of \$359.10, and judgment for said amount was entered thereon, to reverse which the defendant has sued out this writ of error.

Damiani v. Proulx, 195 Ill. App. 154.

CYRUS J. WOOD, for plaintiff in error.

FLYNN & LYON, for defendants in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. WITNESSES, § 95*—*when evidence of witness incompetent.* In a suit by an executor on a promissory note payable to a deceased person, testimony of the defendant that he had paid part of the note to deceased was incompetent under Hurd's Rev. St. 1911, ch. 51, sec. 2 (J. & A. ¶ 5519), defendant being an adverse witness on his own behalf.

2. EXECUTORS AND ADMINISTRATORS, § 227*—*when presentation of claim necessary.* In a suit by an executor on a promissory note payable to a deceased person, evidence of the defendant that he had rendered legal service to the deceased was properly excluded, since before a claim for services could be set off, the claim of defendant should have been presented to the Probate Court for allowance.

3. APPEAL AND ERROR, § 452*—*what must be proved at trial.* The Appellate Court cannot take judicial notice of rules of the Municipal Court.

4. MUNICIPAL COURT OF CHICAGO, § 13*—*what is effect of appearance and affidavit of merits.* In a suit by an executor on a promissory note payable to a deceased person, where the defendant entered his appearance and filed an affidavit of merits and a statement and affidavit of claim on set-off, such appearance was in the nature of a plea of general issue, and the affidavit of merits and plea of set-off constituted notice of his defense.

5. EXECUTORS AND ADMINISTRATORS, § 303*—*when capacity of executor to sue not put in issue.* In a suit on a promissory note by an executor, where the defendant in his statement and affidavit of claim on set-off did not deny that plaintiffs had been appointed executors, such representative character of the plaintiffs was not put in issue but was admitted.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fekete v. Nowak, 195 Ill. App. 156.

**Joseph Fekete, Plaintiff in Error, v. Arthur Nowak,
Defendant in Error.**

Gen. No. 20,522. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. C. H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Action of forcible entry and detainer brought in the Municipal Court of Chicago by Joseph Fekete against Arthur Nowak, to recover possession of premises occupied as a saloon, known as No. 1959 West Grand avenue, Chicago. While the defendant and one Balazs were joined as defendants in the summons and both served, the defendant alone entered an appearance and the case proceeded to trial against him. On the trial below, the jury, under an instruction by the court, returned a verdict finding the defendant not guilty, upon which verdict judgment was entered against the plaintiff for costs, to reverse which the plaintiff has sued out this writ of error.

AARON SOBLE, for plaintiff in error.

MAX LUSTER, for defendant in error; J. AMBROSE GEARON, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 387*—*when breach of contract not shown.* Where a lessor of premises used for a saloon entered into a contract with the lessee by which the lessee was to buy beer from the lessor provided that "fifty per cent. of other popular brands of bottled beer" might be sold by the lessee, and such lessor claimed that there was a breach of the contract and offered to prove that the lessee had not purchased bottled beer from the lessor for two months, such offer of evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was insufficient to show a breach of the contract, since the lessee might have had sufficient beer on hand or might not have sold bottled beer.

Warren Land Company, Appellee, v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, Appellant.

Gen. No. 20,598.

1. CARRIERS, § 102*—*when carrier liable for delay.* A carrier is liable for delay in the shipment of merchandise, even though increased traffic causes such delay, and the shipper knows of the increased traffic, where such carrier continues to receive shipments without giving notice that they would be accepted subject to delay.

2. CARRIERS, § 102*—*what is duty of carrier when delay may be anticipated.* A carrier has no right to accept shipments which the law presumes will be delivered within a reasonable time unless otherwise stipulated, when it knows or by the exercise of reasonable care should know that delay is inevitable.

3. CARRIERS, § 106*—*what will be presumed in action for delay in shipment.* It will be presumed that a carrier by the exercise of reasonable care should have had knowledge of a congested condition of traffic in shipments of hay, when similar conditions existed during several years prior thereto.

4. CARRIERS, § 100*—*what is not excuse for delay in shipment.* Where a bill of lading provided for storage of property shipped if not removed by the consignee within a certain period, a contention of the carrier in a suit by the consignee for delay, that such delay was caused by the congested condition of the terminal tracks due to the failure of consignee to remove the goods which arrived, would not excuse the carrier's delay.

5. CARRIERS, § 110*—*what is measure of damages for delay at common law.* At common law the measure of damages in case of a delayed shipment is the difference between the market value of the goods at the time and place they should have been delivered and the value at the time and place of actual delivery.

6. CARRIERS, § 108*—*when evidence as to damages for delay insufficient.* In an action for delay in a shipment of hay by a carrier, where the plaintiff introduced evidence as to the value of such hay at the time and place of shipment, but gave no evidence as to the value

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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at the time and place it should have been delivered, there was no evidence from which the jury could arrive at the proper measure of damages, and an instruction as to the measure of damages was erroneous.

Appeal from the County Court of Cook county; the Hon. J. E. HILLSKOTTER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement by the Court. This was an action brought in the County Court of Cook county by the Warren Land Company, appellee, hereinafter referred to as the plaintiff, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, appellant, hereinafter designated as the defendant, for damages because of delay in the arrival of four carloads of hay delivered by plaintiff to the defendant at Warrens, Wisconsin, for shipment to Chicago, Illinois, during the month of May, 1912. The declaration consisted of four counts, and the gravamen of the charge in each count was substantially the same, namely, that on certain days in May, 1912, plaintiff delivered certain quantities of baled hay for transportation to Chicago, and that the defendant did not perform its duty in regard to said shipment but negligently delayed the carriage and delivery thereof to the consignee at Chicago for a time beyond what was reasonable, whereby as a direct consequence of the said wrongful, negligent and careless conduct of the defendant, the market value of said hay greatly depreciated and declined from what it would have been if said hay had been carried and delivered by the defendant to the consignee at Chicago within a reasonable time.

To this declaration a plea of general issue was filed, and on the trial below the jury returned a verdict in favor of the plaintiff for \$265.90, upon which verdict the court entered judgment, to reverse which defendant has prosecuted this appeal.

Warren Land Co. v. Chicago, etc., Ry. Co., 195 Ill. App. 157.

CHARLES A. VILAS and IRA C. BELDEN, for appellant;
WILLIAM G. WHEELER, of counsel.

LEWIS S. EATON, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

On the trial below, plaintiff offered in evidence the four bills of lading covering the shipments in question, all of which were alike in form differing only as to the car numbers and quantities of hay shipped. The delay complained of in the declaration and proven by the evidence, consisted of the time that elapsed between the date of arrival of the cars upon the terminals of the Chicago & Northwestern Railway, the connecting and final carrier, and the time the cars were placed upon the team track for unloading. The dates of arrival of the cars upon the terminal of the Chicago & Northwestern Railway were stipulated. The dates of placement upon the team track for unloading were proven by the plaintiff. The plaintiff in its declaration set forth the number of days the delivery of each car was delayed. Defendant admitted the delay proven in the arrival of the cars on the terminal tracks and the time of their placement on the team track; but in explanation of this delay, offered evidence showing that during the months of May and June, 1912 (the period during which the shipment of the hay in question was made), there was an unusual and extraordinary quantity of hay shipped to Chicago over the line of the Chicago & Northwestern Railway Company; that during the said months there were from 530 to 540 cars on hand at the Chicago & Northwestern terminal at Chicago which could not be delivered to its team tracks because the latter were constantly filled to capacity. Evidence was also offered to show that no discrimination was made in favor of any other commodity shipped during this period. Certain tabulated statements and statistics were offered in evidence, and objections to their admission were sustained, and from an examina-

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tion of the record, we think properly so. Such evidence was at best merely cumulative, being compilations in tabular form, of conditions with reference to the unusual and unprecedented congestion testified to by the various witnesses on behalf of the defendant.

The defendant contends that as such testimony was not contradicted, it should have been considered by the court as a complete defense to the claim of the plaintiff; and in support thereof cites, among other authorities, several Illinois cases. These cases, however, as we read them, are so dissimilar in the facts that they can have no application to the case at bar. The court, in its instruction, placed before the jury the correct principles of law applicable to the line of evidence offered in defense of plaintiff's claim. In connection with this instruction, we must consider the further testimony in evidence, that this congested condition which defendant stated was unusual and unprecedented, was one which had prevailed not only during the year 1912, but also during the years 1910-1911; furthermore, there was no evidence to show that defendant had called plaintiff's attention to this condition or had accepted the shipment subject to the delay by reason of these conditions. While defendant argues that the representative of the plaintiff in Chicago knew of such condition and that this constituted notice to the plaintiffs, yet the decisions hold that knowledge even by the plaintiffs themselves would not bar a recovery where the carrier knowingly continues to receive shipments without notifying the shipper that the shipment would be accepted subject to delay in delivery.

The holding of this property by the defendant upon its terminal tracks is not unlike holding same in storage. Defendant admits that, located as these cars were on its terminal tracks, they were inaccessible, and only when placed on the team track could the consignee make disposition of the shipment for the shipper. Defendant had no right to accept shipments (which the

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law presumes will be delivered within a reasonable time unless otherwise stipulated) when it knew, or by the exercise of ordinary care should have known, that delay was inevitable. And in view of the evidence that similar conditions prevailed on defendant's terminal tracks during several years previously thereto, it is fair to presume that by the exercise of reasonable care, the defendant should have had knowledge of this congested condition. *Great Western Ry. Co. of Canada v. Burns*, 60 Ill. 284; *Illinois Cent. R. Co. v. Cobb, Christy & Co.*, 64 Ill. 128.

Section 5 of the bill of lading provided as follows:

"Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier. * * *"

Therefore, the additional claim made by defendant that the congestion was due to the failure of the consignee of this particular shipment, and of consignees of other shipments, to unload the cars after they were placed upon the team track would not excuse defendant's delay, as it had by its contract expressly provided a remedy to relieve a condition brought about by the failure of consignees to unload cars after they were placed on the team track. Even without such provision as contained in section 5 of the bill of lading, under *Illinois Cent. R. Co. v. Cobb, Christy & Co.*, *supra*, delay on the part of a shipper or his representative, in unloading cars placed on the team track, does not excuse the defendant. Every benefit that the defendant was entitled to under its evidence was given it by the court in its instruction to the jury, who, by

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their verdict, were evidently of the opinion that such evidence did not absolve the defendant from the negligence charged in the declaration. And after a careful examination of the record, we believe the jury were warranted in arriving at that conclusion.

Defendant, however, complains of the instruction with reference to the measure of damages, which, as given by the court in its instruction, was based upon the first paragraph of section 3, which is as follows:

“The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.”

There can be no doubt that at common law the measure of damages, in case of a delayed shipment, is the difference between the market value of the goods at the time and place they should have been delivered and the value at the time and place of actual delivery. Plaintiff, however, contends that the parties, by section 3 of the bill of lading, provided for a different measure of damages, namely, the difference between the value at the place and time of shipment, plus the freight charges, and the value of the property at the time and place of actual delivery. Defendant insists, however, that said section 3 has no reference to any loss or damage arising from delay, but only to loss or damage sustained by the goods themselves, namely, to the substance of the property shipped; and that the measure of damages for the delay in question is the one that prevails at common law. We have already set out that part of section 3 upon which plaintiff relies

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in support of its contention. Defendant argues that the other paragraphs in the same section show conclusively that the loss or damage referred to in the paragraph relied upon by plaintiff does not apply to damage by reason of delay. The said section 3, after the paragraph already set out, provides as follows:

“Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property. * * * Unless claims are so made the carrier shall not be liable.

“Any carrier or party liable on account of loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.”

Defendant points out that the absence of the word “delay” in the paragraph relied upon by the plaintiff, and its presence in the paragraph immediately following, is an indication that the word “delay” was intentionally omitted in the preceding paragraph, because, obviously, damage occurring to a party by reason of delay cannot properly or logically be measured by the value at the point of origin. We believe there is much force in this contention. In an action for damages occasioned by delay, necessarily there must be proof of the value of the property at the time and place it should have been delivered, for, without such evidence, proof of the value of the property when actually delivered establishes nothing, for unless it appears that the value of the property at the time and place it should have been delivered was more than the value of the goods at the time of actual delivery, the delay could not have resulted in any damage. Moreover, the concluding paragraph which refers to the right of the carrier or party liable, to have the benefit of insurance effected upon or on account of said property, lends additional force to this construction. It therefore appears to us that the contention of the defendant that section 3 of

Rezek v. Grosch et al., 195 Ill. App. 164.

the bill of lading has no application to damage caused by delay of the shipment is not only reasonable and just, but that any other construction would be inconsistent with reason and lead to confusion in arriving at the proper damages.

Plaintiff, in offering evidence as to the damages sustained by it, introduced evidence only with reference to the value of the property at the time and place of shipment, giving no evidence whatever as to the value thereof at the time and place it should have been delivered. The court, in its instruction to the jury, adopted the measure of damages contended for by the plaintiff, refusing that contended for by the defendant. Clearly, therefore, not only did the court improperly instruct the jury, but there was no evidence from which the jury could have arrived at the proper measure of damages. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164; *Byers v. Southern Exp. Co.*, 165 N. C. 542; *Morrow v. Missouri Pacific Ry. Co.*, 140 Mo. App. 200. Therefore, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Harry A. Rezek, Plaintiff in Error, v. Fred Grosch et al., Defendants in Error.

Gen. No. 20,623. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. GEORGE J. COWING, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Suit by Harry A. Rezek against Fred Grosch, W. L. Hoffman and Oscar Heineman to recover for the value of services alleged to have been rendered in connection with the sale of certain realty situated at the southwest

Grapperhaus et al. v. Taylor, 195 Ill. App. 165.

corner of Armitage and Fairfield avenues in the city of Chicago. Upon the trial before the court without a jury, the plaintiff dismissed as to the defendants W. L. Hoffman and Oscar Heineman, and the case having proceeded against Grosch alone, the court found the issues for the defendant, in whose favor judgment for costs was rendered, to reverse which plaintiff has sued out this writ of error.

GUSTAVE NEUBERG, for plaintiff in error.

BOWERSOCK & STILWELL, for defendants in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1242*—*when party cannot complain of dismissal.* An order of dismissal as to one defendant cannot be reviewed when such dismissal was entered on the motion of the party complaining.

2. APPEAL AND ERROR, § 1414*—*when finding of court will not be disturbed on appeal.* In an action for commissions, a conclusion of the trial court that a real estate broker had not proven his case by a preponderance of evidence will not be disturbed on appeal, it appearing that such conclusion was not clearly and manifestly against the weight of evidence.

**Frederick W. Grapperhaus and Reginald C. Russell,
trading as Grapperhaus, Russell & Company, Appel-
lants, v. John M. Taylor, Appellee.**

Gen. No. 20,649. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Action brought in the Municipal Court of Chicago by Frederick W. Grapperhaus and Reginald C. Russell,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Atkins v. Smith, 195 Ill. App. 166.

partners trading as Grapperhaus, Russell & Company, against John M. Taylor for real estate commissions claimed to be due from defendant in bringing about an exchange of properties between the defendant and one Nicholas Hunt. On the trial below the jury returned a verdict in favor of the defendant, upon which the court entered judgment, to reverse which plaintiff has prosecuted this appeal.

ASHCRAFT & ASHCRAFT, for appellants; CHARLES F. RATHBUN, of counsel.

C. D. LEE, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 93***—*what is question of fact in action for compensation.* The question whether a real estate broker was the procuring cause in bringing about a transfer of property is a question of fact for the jury.

2. **APPEAL AND ERROR, § 1411***—*when finding of jury not disturbed on appeal.* A finding of the jury will not be disturbed on appeal unless clearly and manifestly against the weight of the evidence.

3. **BROKERS, § 29***—*what broker is entitled to compensation.* Where an owner of property employs several real estate brokers to sell such property, the broker whose efforts actually bring about the sale is the broker who is entitled to the commission.

**Samuel Atkins, Defendant in Error, v. William Smith,
Plaintiff in Error.**

Gen. No. 20,666. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Smolen v. Ziemba et al., 195 Ill. App. 167.

Statement of the Case.

Suit by Samuel Atkins against William Smith for services rendered in reporting a case wherein defendant was attorney for the plaintiff. On the trial below before the court without a jury, the court found the issues for the plaintiff and entered judgment against the defendant for \$19.75, to reverse which the defendant has sued out this writ of error.

WILLIAM C. SMITH, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*when finding of trial court not disturbed on appeal.* A finding of a trial court that services of a court stenographer were rendered to an attorney instead of his client will not be disturbed on appeal, it appearing that such finding was not clearly and manifestly against the weight of the evidence.

2. NEW TRIAL, § 76*—*when properly denied.* A motion for new trial on the ground of newly discovered evidence is properly denied where the affidavits show that such evidence is merely cumulative, and there is nothing to show that the party, at the trial, attempted to secure such evidence, or asked for a continuance to obtain it.

Anna J. Smolen, Defendant in Error, v. Michael Ziemba and Mrs. Michael Ziemba, Plaintiffs in Error.

Gen. No. 20,677. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Smolen v. Ziemba et al., 195 Ill. App. 167.

Statement of the Case.

Proceeding in the Municipal Court of Chicago by Anna J. Smolen against Michael Ziemba and Mrs. Michael Ziemba, for the unlawful taking and converting to their own use of a piano belonging to the plaintiff, of the value of \$175. The defendants contended that the piano was kept by them at the plaintiff's request and that the plaintiff had refused to remove it when requested. Upon the trial below, before the court without a jury, the court found the issues in favor of the plaintiff and assessed her damages in the sum of \$150 and costs, for which amount judgment was entered, to reverse which defendants have sued out this writ of error.

JONES, KERNER & POSVIO, for plaintiffs in error;
DE WITT C. JONES, of counsel.

No appearance for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. TROVER AND CONVERSION, § 30*—*when demand for property alleged to be converted is necessary.* In an action for the conversion of a piano, where the evidence showed that the defendants came into possession of such piano lawfully, there being no actual conversion in the form of a claim of ownership, the sale or abuse or destruction of the property, or acts amounting to an assertion of dominion over the property inconsistent with the owner's right, plaintiff was compelled to rely upon proof of a demand for the property and refusal by the defendants.

2. TROVER AND CONVERSION, § 39*—*when conversion not shown.* In an action for the conversion of a piano, evidence held insufficient to show a demand for such piano and a refusal by the defendants to comply with such demand.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frazer v. Kuntzeman, 195 Ill. App. 169.

**Joseph Frazer, Appellee, v. Charles Kuntzeman,
Appellant.**

Gen. No. 20,777. (Not to be reported in full.)

Appeal from the City Court of Chicago Heights; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Suit by Joseph Frazer against Charles Kuntzeman to recover one hundred dollars paid by plaintiff to defendant for rent for the months of May and June, of certain premises owned by defendant, situated on Sixteenth street, Chicago Heights, Cook county, Illinois. The suit was originally brought before a justice of the peace. Upon trial in that court, judgment for a like amount was entered, from which an appeal was taken to the City Court of Chicago Heights, where, upon trial *de novo* before the court without a jury, the judgment in favor of plaintiff for one hundred dollars herein appealed from was entered.

ROBERT A. MEIER, for appellant; GEORGE A. BRINKMAN, of counsel.

No appearance for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1414*—*when finding of trial court not disturbed on review.* A finding of a court upon a question of fact where a jury is waived will not be disturbed unless clearly and manifestly against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gallay v. Mathis, 195 Ill. App. 170.

**Etha Gallay, Plaintiff in Error, v. August Mathis,
Defendant in Error.**

Gen. No. 20,797. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

Statement of the Case.

Suit by Etha Gallay against August Mathis to recover damages for personal injuries sustained as a result of being run down by an automobile owned and operated by the defendant. The statement of claim set forth a cause of action and subsequently the defendant filed his appearance in said cause by his attorney, and demanded a trial by jury. The following day, on motion of the defendant, an order was entered that the time within which to file an affidavit of merits in said cause be extended five days. Seven days later, judgment by default was entered against defendant because of his failure to file an affidavit of merits within the time allowed by the court. A jury was impaneled and sworn, who, after hearing the evidence and arguments of counsel, returned a verdict assessing plaintiff's damages in the sum of \$1,000, upon which verdict the court entered judgment. The record further shows that on the hearing, defendant was neither present nor represented. More than sixty days after judgment was entered, a motion was made by the defendant, through his attorney, to vacate and set aside the said judgment, but this motion was denied by the court. Later, defendant filed a sworn petition praying that leave be given the defendant to file an affidavit of merits instant. Upon the hearing on this petition, both parties being represented, the court entered an order setting aside the judgment and granting defendant leave to file an affidavit of merits instant. To procure

Gallay v. Mathis, 195 Ill. App. 170.

reversal of this order, this writ of error has been sued out.

JACOB LEVY, for plaintiff in error; JOSIAH BURNHAM, of counsel.

BRUNDAGE, LANDON & HOLT, for defendant in error.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 19*—*when default judgment may be set aside.* Under section 21 of the Municipal Court Act (J. & A. § 3333), when thirty days have elapsed after entry of a judgment, such court can obtain jurisdiction only by a motion to vacate the judgment upon proof of errors of fact not appearing of record, which would be in the nature of a writ of error *coram nobis* at common law, or by petition in the nature of a bill in equity showing equitable grounds for vacation of the judgment.

2. JUDGMENT, § 142*—*when affidavit insufficient to warrant setting aside of judgment.* An affidavit to set aside a judgment stating that neither defendant nor his attorney had notice that a default would be applied for, or that damages would be ordered, does not confer jurisdiction on a court of chancery to entertain a bill to vacate a judgment.

3. MUNICIPAL COURT OF CHICAGO, § 19*—*what is nature of proceeding to vacate default judgment.* A proceeding to vacate a judgment of the Municipal Court is in the nature of a bill in equity, and the facts essential to confer jurisdiction upon a court of chancery must be stated positively and are not sufficiently set forth where they are merely stated to be on information and belief.

4. APPEAL AND ERROR, § 716*—*what is effect of record as to facts shown.* A record of the Municipal Court showing affirmatively that no affidavit of merits was filed imports verity.

5. MUNICIPAL COURT OF CHICAGO, § 19*—*when court is without jurisdiction to vacate judgment.* Where a petition to vacate a default judgment does not account for the failure of defendant to file an affidavit of merits within the time allowed, and does not explain why a motion to vacate the judgment was not made within the statutory period of thirty days, the Municipal Court is without jurisdiction to enter an order vacating the judgment.

6. APPEAL AND ERROR, § 1083*—*when cross-errors cannot be considered on appeal.* Where a writ of error is directed to an order

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Betts v. Tate, 195 Ill. App. 172.

vacating a default judgment, cross-errors as to error of the court in entering the original default cannot be considered, they being the proper subject-matter of a separate writ of error.

Edward E. Betts, Appellee, v. Homer G. Tate, Appellant.

Gen. No. 20,827. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. ISAAC HUDSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Action on the case for fraud and deceit alleged to have been practiced by Homer G. Tate, the defendant, upon Edward E. Betts, the plaintiff, in the purchase by defendant from plaintiff of certain real estate valued at \$900, the fraud alleged being in inducing plaintiff to accept a note of one Dalbey for \$364.25 as part payment of the purchase money for the real estate. On the trial below the jury found the defendant guilty and assessed the plaintiff's damages in the sum of \$364.25 plus interest from the date of the note, May 3, 1912. Upon this verdict the court entered judgment against the defendant for the sum of \$364.25 and costs, to reverse which the defendant has prosecuted this appeal.

CHARLES V. CLARK, for appellant.

E. L. GARY and A. J. DEUTSCHMANN, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1411*—*when verdict will be set aside on appeal.* In an action for fraud and deceit in the sale and purchase of real

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gorman v. Gorman, 195 Ill. App. 173.

estate, a verdict for the plaintiff is clearly and manifestly against the weight of the evidence, when it appears that no material false representations were made, and that the plaintiff did not rely upon such statements as were made.

**William C. Gorman, Appellant, v. May Gorman,
Appellee.**

Gen. No. 20,840. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PERRI, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Bill for divorce brought by William C. Gorman against May Gorman, on charges of desertion and adultery. The defendant made no appearance and was defaulted. At the hearing the bill was dismissed for want of equity and this appeal followed.

CHARLES S. McNETT, for appellant.

No appearance for appellee.

MR. JUSTICE PAM delivered the opinion of the court..

Abstract of the Decision.

1. DIVORCE, § 53*—*when dismissal of divorce bill proper.* The dismissal of a bill for divorce for want of equity, on the charge of adultery, is not clearly and manifestly against the weight of the evidence, where it appears that the court stated that he did not believe the plaintiff's witness, and the testimony of plaintiff was thus left uncorroborated.

2. DIVORCE, § 53*—*when refusal to allow additional evidence is error.* On appeal from a decree dismissing a bill for divorce, where the record showed that the trial court stated that complainant had testified that he had deserted his wife, but did not show evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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warranting such statement, the action of the court in refusing to allow the introduction of additional testimony was erroneous, as depriving the plaintiff of a fair and impartial hearing.

Theresa Hamill, Administratrix, Appellee, v. Peter Territilli et al., on appeal of City of Chicago, Appellant.

Gen. No. 20,855.

1. MASTER AND SERVANT, § 836*—*when servant not independent contractor.* Under a contract whereby a city had the right to inspect and approve not only the material and labor but also the tools, appliances and methods used by a contractor, the foremen of the contractor were compelled to obey the orders of the city engineer, the city had the right to dismiss employees who did not obey instructions as to carrying out the contract, and the city reserved the right to make alterations in the plans, the contractors were not independent contractors but servants of the city within the rule as to the doctrine of *respondeat superior*.

2. MASTER AND SERVANT, § 836*—*what is immaterial in determining whether person is independent contractor.* Under a contract whereby a contractor was a servant of a city, since the city retained the control and supervision of the work, it was immaterial that such control was not actually exercised.

Appeal from the Superior Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement by the Court. This is an action on the case by Theresa Hamill, administratrix of the estate of William Hamill, deceased, against Peter Territilli, Ole Scully and the City of Chicago, for their alleged negligence in causing the death of the intestate. On the trial of the case below the jury returned a verdict against the three defendants in the sum of \$8,000, upon which verdict the court rendered judgment, and from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

this judgment an appeal has been prosecuted by the City of Chicago alone, whom we shall hereafter designate as the appellant.

The intestate, at the time of his death, was employed by Territilli & Scully in laying a sewer pipe in the bottom of a trench which was being dug by the said Territilli and Scully under a contract with the appellant. The intestate met his death by the caving in of one side of the trench in which he was working. The negligence charged is that the walls or sides of this trench were inadequately braced, as a result of which the west wall caved in for a distance of fifteen or twenty feet while the intestate was working in the bottom of the trench, injuring him so severely as to cause almost instant death.

JOHN W. BECKWITH and N. L. PIOTROWSKI, for appellant; DAVID R. LEVY and MATTHEW J. O'BRIEN, of counsel.

GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

There is no controversy on any question of fact, the only question for review being one of law as to the construction of the contract between the said Territilli and Scully and the appellant, under which the work was being done at the time plaintiff's intestate met his death. Both in the brief filed and in the oral argument made before this court, counsel for the appellant admitted that the only question in the case was whether or not, under the contract of employment, the relationship existing between Territilli and Scully and the appellant was that of independent contractor or that of master and servant, and further asserted that this question must be determined solely from the written contract offered in evidence. Appellee concurs in this statement as to the issues involved, and as we view the

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facts in the case, under the rule as laid down in *Pioneer Fireproof Const. Co. v. Hansen*, 176 Ill. 100, and in *Foster v. City of Chicago*, 197 Ill. 264, we are of a similar opinion.

Appellant strongly contends that under the contract of employment Territilli and Scully were independent contractors for whose negligence it was not responsible, while appellee urges the contrary.

In its brief and oral argument appellant has placed great reliance in the case of *Foster v. City of Chicago*, *supra*, which is also reported in 96 Ill. App. 4. In the course of the decision of the Appellate Court, which was adopted as the *per curiam* decision of the Supreme Court, it was said (p. 7):

“The general rule is stated by Bishop on Noncontract Law, sec. 602, to be that ‘a contractor who simply undertakes to bring about a result after his own methods is not a servant’ of his employer, and the latter is not liable for such contractor’s negligence; while on the other hand, one ‘who, though he is to have a stipulated price for a thing, executes it under the direction and superintendence of the employer,’ is a servant, and the employer is liable to third persons injured by the negligence of such a servant.”

And the court further stated in the course of its opinion (p. 7):

“The liability of the city, therefore, depends mainly upon the contract—whether or not, by the written agreement, the work in doing which appellant’s intestate lost his life was done under the direction and superintendence of the city, in such sense as to make the latter liable.”

In that case the court held that the relationship of independent contractor existed and that the city was not liable. Appellant, in urging that the *Foster* case, *supra*, controls in the case at bar, calls the attention of this court particularly to the similarity of facts in both cases; and our examination of the facts shows that the circumstances and manner of the accident are

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almost identical. While appellant further argues that the contracts in both cases are practically the same, we are of a contrary opinion. Appellee, however, insists that our Supreme Court, in *City of Chicago v. Murdock*, 212 Ill. 9, has adopted a different construction of the contract in issue in *Foster v. City of Chicago*, *supra*. In order to determine whether or not such was the effect of the decision in *City of Chicago v. Murdock*, *supra*, we have carefully examined the contracts offered in evidence in both the *Foster* and *Murdock* cases, *supra*, and find that they are in fact identical. While it is true that in the *Murdock* case the court held that the doctrine of *respondeat superior* applied because the work performed under the contract was inherently dangerous, yet the court also held that the contract clearly showed upon its face that the city of Chicago retained, through its commissioner of public works, absolute control and supervision of the work, and the manner in which it should be performed. In arriving at this conclusion, the court in the course of its opinion, stated:

“Upon looking into the contract between the city of Chicago and the contractor, Duffy, we find that it was signed by W. D. Kent, commissioner of public works, on behalf of the city, and contains, among other provisions, the following: ‘All of the material used in said work, manner, time and place of doing same, together with all things therewith connected, must be in each and every particular satisfactory to the commissioner of public works of said city. Said work shall be done in accordance with plans prepared for the doing of the same. * * * Said work shall be commenced on or before the first day of October, A. D. 1895, shall progress regularly and uninterruptedly after it shall have been begun, except as shall be otherwise ordered by the commissioner of public works,’ etc. ‘Should the commissioner of public works deem it proper or necessary, in the execution of the work, to make any alterations which shall increase or diminish the expense, such alterations shall not vitiate or annul the contract

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or agreement hereby entered into, but the said commissioner shall determine the value of the work so added or omitted, such value to be added to or to be deducted from the contract price as the case may be. And the said party of the first part covenants and agrees to perform all of said work under the immediate direction and superintendence of the commissioner of public works of the city of Chicago, and to his entire satisfaction, approval and acceptance. All material used and all labor performed shall be subject to the inspection and approval, or rejection, of said commissioner, and the said city of Chicago hereby reserves to its commissioner of public works the right finally to decide all questions arising as to the proper performance of said work.' In short, the contract clearly shows upon its face that the city retained, through its commissioner of public works, the absolute control and supervision of the work and the manner in which it should be performed. Therefore, under the foregoing decisions (*City of Chicago v. Joney*, 60 Ill. 383, and *City of Chicago v. Dermody*, 61 Ill. 431, *supra*), Duffy was not an independent contractor, and for his negligence the doctrine of *respondeat superior* must apply."

The very language in the contract quoted by the court in the *Murdock* case, *supra*, was construed in the *Foster* case, *supra*, by Judge Freeman of the Appellate Court as merely reserving to the city the right to generally supervise the work so as to insure compliance with the contract and to obtain the result called for thereby. The opinion in the *Murdock* case is apparently adhered to in the case of *Boyd v. Chicago & N. W. Ry. Co.*, 217 Ill. 332, wherein the court said:

"Plaintiff in error insists the railway companies are liable under the decision in the *City of Chicago v. Murdock*, 212 Ill. 9, on the ground that the Chicago and Northwestern Railway Company retained control and direction of the work. In that case the work was intrinsically and inherently dangerous, and in such a case the rule of *respondeat superior* applies although

the work is done by an independent contractor. The commissioner of public works also had control of the manner and method of doing the work, with power to inspect, approve or reject all material and labor and to make alterations in the work."

Had the contract in the case at bar contained only provisions similar to those set forth in the contracts in the *Foster* and *Murdock* cases, *supra*, the said Territilli and Scully, under the decision of the later case, must be considered not as independent contractors, but as servants of the appellant, for whose negligence it is liable. However, a comparison of the contract in the case at bar with those in the *Murdock* and *Foster* cases shows that the contract now before us contains not only all the provisions construed in the aforementioned cases, but contains, in addition, others increasing and augmenting the power of the appellant to control and supervise the work to be performed thereunder. In the *Murdock* and *Foster* cases the contracts provided that "all material used and all labor performed shall be subject to the inspection and approval or rejection, of said commissioner, and the said City of Chicago hereby reserves to its commissioner of public works the right finally to decide all questions arising as to the proper performance of said work," while in the case at bar the contract further provided that "*all appliances, tools and methods used* shall also be subject to the inspection and approval of the said board of local improvements." (Italics ours.) In addition, the contract in the case at bar provides:

"The contractor shall employ capable superintendents or foremen to represent him on the work, and *they shall receive and obey orders from the engineer.*" (Italics ours.)

"The Board of Local Improvements shall have authority to order the dismissal of any employee on the work who refuses or neglects to obey any of its instructions relating to the carrying out of the provisions and intent of these specifications, or who is incompetent,

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unfaithful, abusive, threatening or disorderly in his conduct, and such person shall not be again employed on the work.”

Appellant, under this contract, had the right to inspect and approve not only the material and labor but also the tools, appliances and methods used. The foremen of Territilli and Scully were compelled to obey the orders of the engineer of appellant. Appellant also had the right to order the dismissal of any employee who refused or neglected to obey any of its instructions relating to the carrying out of the provisions and intent of the specifications which under the contract were a part thereof; moreover, appellant reserved to itself the right to make any alterations in the plans and specifications it deemed desirable or necessary, and such change would not annul or vitiate it. Clearly, therefore, under the contract in the case at bar, tested in the light of the decisions, it must be held that appellant did retain the absolute control and supervision of the work and the manner in which it should be performed. The fact that this right of control was not exercised is immaterial; it is sufficient that the right existed.

“The absolute test is not the exercise of power of control, but the right to exercise power of control. * * * Although the trustees should be across the Atlantic, nevertheless, * * * if they retained the power to control and direct the work, they would be liable; because it is the possession of the right of interference, the right of control, that puts upon a party the duty of seeing that the person who stands in that relation does his duty properly. If they have retained to themselves the right of directing the mode of doing the work, then, if the work is done wrong, the simple principle is that they are responsible.” *Linnehan v. Rollins*, 137 Mass. 123. To the same effect are 16 Am. & Eng. Encyc. of Law, p. 186; 26 Cyc. of Law and Proc. p. 1547, and Moll on Ind. Cont. & Emp. L. P. 43. “The relation of master and servant does not cease ‘so long as the master reserves any control or right of control

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over the method and manner of doing the work, or the agencies by which it is to be effected." *Speed v. Atlantic & P. R. Co.*, 71 Mo. 303.

We are therefore of the opinion that Territilli and Scully were not independent contractors but the servants of the appellant, and for their negligence the doctrine of *respondeat superior* must apply.

Finding no reversible error, the judgment will be affirmed.

Affirmed.

Charles A. Phelps, Appellee, v. Thomas M. Hunter, Appellant.

Gen. No. 20,889. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and judgment here. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

Statement of the Case.

Action of replevin by Charles A. Phelps against Thomas M. Hunter, bailiff of the Municipal Court of Chicago. From a judgment for plaintiff, defendant appeals.

EMERY S. WALKER and CHARLES M. RUTH, for appellant.

ARTHUR L. BALLAS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 170*—*what constitutes rendition.* The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. JUDGMENT, § 232*—*what constitutes entry.* The entry of a judgment is a ministerial act which consists in spreading it upon the record or writing it at large in a docket or other official book.

3. MUNICIPAL COURT OF CHICAGO, § 19*—*how judgment evidenced.* A judgment of the Municipal Court of Chicago is evidenced not by an order, as entered on half sheets, but by the order as spread out on the record by the clerk.

Margaretta Killham et al., Appellees, v. James Chaloupka, Appellant.

Gen. No. 20,904. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915.

Statement of the Case.

Action of trespass on the case by Margaretta Killham, Mabel Killham, Mary Killham, George Killham, Henry Killham, Sarah Killham, Ethel Killham, Raymond Killham and Alfred Killham, minors suing by their mother, Margaretta Killham, as next friend, against James Chaloupka, under the Dramshop Act, sec. 9 (J. & A. ¶¶ 4600-4655 inc.), to recover damages for injuries to their means of support by reason of the intoxication of George Killham, husband and father of said plaintiffs, caused in whole or in part by the sale to him of intoxicating liquors by the defendant. From a judgment for plaintiffs for \$1,500, defendant appeals.

The evidence offered on behalf of the plaintiffs showed that George Killham, the husband and father of the plaintiffs, commencing in the year 1906, had for five years been employed by the federal government in the post-office department, at first receiving an annual salary of \$600, which was gradually increased until the summer of 1911, when he was receiving \$1,100 per year; that if the said George Killham had continued

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in his position another year his salary would have been increased to \$1,200 per year; that during said period he was in the habit of frequenting the saloon of the defendant, buying liquor and becoming intoxicated thereby; that by reason of said intoxication he was, during these various years, absent from his work a great part of the time, during some years being absent as much as two or three months; that according to the records of the post office, admitted in evidence on behalf of the defendant, Killham was absent from work 242½ days, whereby he lost in pay the sum of \$654, which record further showed that in the year 1911 alone, up to August 19th, when Killham resigned from the service, he was absent 99 days, 60 of which were immediately prior to his resignation; that the said Killham, when asked why he resigned, testified:

“Why, I was not able to work. I was—my nerves was all gone from drinking and I thought it best to resign because I thought I would get discharged anyway.”

The evidence further showed that it was customary for him to turn all his money over to his wife, with the exception of a few dollars which he withheld to defray personal expenses; that at the time suit was brought, all the children who are plaintiffs in this action were minors, but that one had become of age prior to the time of the trial of the case; that notice had been served upon the defendant by Mrs. Killham early in 1908, and on several occasions thereafter, not to sell her husband intoxicating liquors; that during the year 1908 Gertrude Ivers, a daughter of George Killham, had read to defendant a notice in writing not to sell George Killham any intoxicating liquors. The testimony of the plaintiffs also shows that from December 24, 1913, up to the trial of this case, May, 1914, he contributed to the support of the plaintiffs the sum of only \$18; that during September, 1913, he was in a place known as the Washingtonian Home; and that Mar-

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garetta Killham, his wife, and one of the plaintiffs worked two days each week doing general housework to support herself and family, and was also compelled to accept assistance from the United Charities and the county authorities.

Defendant, testifying in his own behalf, disclaimed any acquaintance with Killham before the spring of 1909, and stated further that while in his saloon, Killham never drank to excess; that he never at any time sold him enough liquor to produce intoxication, nor did he recollect ever having seen Killham inebriated. He denied ever having seen Mrs. Killham at his place of business or that he had ever received any notice from either her or anyone else, not to sell liquor to the said Killham. He further testified that the first time he received or heard of any such notice was in 1911, about three weeks before the beginning of this suit, when defendant's partner, one Taluzek, told him that notice had been given, following which no more liquor was sold to Killham.

Taluzek, the partner, testified that Killham never took more than a few small drinks at any one time, and that he never saw Killham intoxicated either in the saloon or elsewhere, and that the first time he received notice not to sell Killham any liquor was in August, 1911. Another witness, who at one time tended bar in defendant's place for about three weeks, and who lived in the neighborhood, stated he had never seen Killham drink to excess in the saloon of defendant, nor had he ever seen him intoxicated at any time, but that he had often seen Killham take two or three small drinks of liquor in the morning.

The defendant complained of the following instruction:

"The court instructs the jury that if they find from the evidence that plaintiff, Margaretta Killham, did serve notice on defendant, or any of his agents, asking defendant not to sell liquor to her husband, George E.

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Killham, and that defendant failed to comply with said notice, then if you find from the evidence that plaintiffs are entitled to damages you may assess exemplary damages for the failure of defendant to comply with said notice.”

LACKNER, BUTZ, VON AMMON & JOHNSTON, for appellant.

SAMUEL W. NORTON, for appellees.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 187*—*when minor children entitled to recover under Dramshop Act.* Minor children are entitled to recover damages for injuries to their means of support by reason of the intoxication of their father under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), although the mother is able to support them, as the act is intended to protect the family of a drunkard against immediate or probable want of support.

2. INTOXICATING LIQUORS, § 208*—*what evidence not admissible in action under Dramshop Act.* Evidence that a drunkard frequented other saloons is inadmissible on the question of damages, in an action by the wife and children for damages for injuries to their means of support by reason of intoxication, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), where the wife objected to the sale of intoxicating liquors to the husband, as an action may be maintained against one or all of the persons selling intoxicating liquors to a drunkard for the entire loss, and a recovery and satisfaction against one constitutes a bar to a recovery against another who may have contributed in causing the same intoxication.

3. JUDGMENT, § 460*—*judgment under Dramshop Act against one liquor seller as bar to judgment against another.* A recovery and satisfaction against one person selling liquor to a drunkard, in an action by the wife and children for damages for injuries to their means of support, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), constitutes a bar against another who may have contributed in bringing about the same intoxication.

4. INTOXICATING LIQUORS, § 189*—*liquor sellers' joint and several liability under Dramshop Act.* Under the Dramshop Act (J. & A. ¶ 4609), the wife and minor children of a drunkard have the right

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to sue either one or all of the persons who sold the husband and father intoxicating liquor, for damages for the entire injury to their means of support.

5. INTOXICATING LIQUORS, § 232*—*inequality of interest of plaintiffs in damages recoverable in action under Dramshop Act.* The amount of damages recoverable in a joint action by the wife and children of a drunkard, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), is not limited to the period that all the plaintiffs have an equal interest in the whole of the recovery, and even if one of the children marries and is no longer dependent upon the father, the jury may determine from the evidence the extent to which each of the plaintiffs is injured up to the time of trial, and return a verdict for the gross amount.

6. INTOXICATING LIQUORS, § 232*—*damages recoverable in action under Dramshop Act not required to have accrued prior to bringing of action.* In an action by the wife and minor children of a drunkard for damages for injuries to their support, due to the intoxication of the husband and father, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), a recovery may be had for all damages accruing to the plaintiffs which naturally and proximately proceeded from such intoxication, although a part thereof accrued after the commencement of the suit.

7. INTOXICATING LIQUORS, § 251*—*when instruction in action under Dramshop Act not prejudicial.* In an action by the wife and minor children of a drunkard, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for damages for injuries to their means of support due to the intoxication of the husband and father, an instruction to the effect that although the evidence as to damages resulting from injury to the plaintiffs' means of support were indefinite, still the jury should establish the damages from such evidence pertaining thereto as was before them, *held* not to be prejudicial in the light of other instructions, and because of the fact that the amount of the verdict showed that the jury did not speculate as to the damages.

8. INTOXICATING LIQUORS, § 250*—*when instruction in action under Dramshop Act not misleading.* In an action by the wife and minor children of a drunkard, under the Dramshop Act, sec. 9 (J. & A. ¶ 4609), for damages for injuries to their means of support due to the intoxication of the husband and father, an instruction to the effect that if the jury found from the evidence that the wife served notice on the defendant or his agents not to sell liquors to the husband and that defendant failed to comply with said notice, then, if they found from the evidence that the plaintiffs were entitled to damages, exemplary damages might be assessed for failure to comply with said notice, *held* not misleading as authorizing the awarding of exemplary damages although no actual damages resulted after the giving of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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notice, because of the fact that the word "actual" was omitted before the word "damages."

9. INTOXICATING LIQUORS, § 249*—*when instruction in action under Dramshop Act not prejudicial.* In an action by the wife and minor children of a drunkard, under the Dramshop Act, sec. 9 (J. & A. § 4609), for damages for injuries to their means of support due to the intoxication of the husband and father, an instruction to the effect that there could be a recovery for injuries to the person as well as to the means of support, *held* not prejudicial where the court in eighteen other instructions had charged the jury that a recovery could be had only for damages for injuries to their means of support.

10. INTOXICATING LIQUORS, § 245*—*when verdict in action under Dramshop Act not excessive.* In an action by the wife and minor children of a drunkard, under the Dramshop Act, sec. 9 (J. & A. § 4609), for damages to their means of support due to the intoxication of the husband and father, a verdict for \$1,500 *held* not excessive.

11. APPEAL AND ERROR, § 1411*—*when verdict on conflicting evidence will not be disturbed.* Where there is a conflict in the evidence, the verdict of the jury on questions of fact will not be disturbed unless such verdict is manifestly and clearly against the weight of evidence.

**Henry Grandt, Jr., and Louis Witt, Appellants, v.
Chicago, Burlington & Quincy Railroad Company,
Appellee.**

Gen. No. 20,914.

1. NEGLIGENCE, § 12*—*duty of carrier to anticipate use to which property shipped may be put.* When a common carrier knows, or in the exercise of ordinary care should know, that a car contains a poisonous substance known as white lead, and knows or should know that the car is intended to be used to carry brewery refuse intended as cattle feed, it is its duty to anticipate that the refuse may be fed to cattle.

2. ACTION, § 32*—*when action of tort will lie.* An action of tort may lie for breach of duty imposed by law independently of contract.

3. NEGLIGENCE, § 20*—*when action of tort will lie against carrier for failure to furnish suitable car to third person.* An action of tort to recover damages arising out of the failure of a carrier to perform its duty to furnish a suitable car to the consignor of brewery refuse, intended to be used as cattle feed, lies in behalf of one purchasing

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such feed from the consignee against such carrier, independently of contract, when his cattle died due to the fact that the feed became contaminated with white lead which was on the floor of the car.

4. **CARRIERS, § 71***—*when carrier not relieved of duty to furnish suitable car.* The fact that the consignor of brewery refuse, intended for cattle feed, agrees with the carrier to clean a car in which the feed is to be shipped does not relieve the carrier from its duty to furnish a suitable car for such purpose, as the consignor is simply the agent of the carrier.

5. **NEGLIGENCE, § 79***—*when contributory negligence in not discovering poison in fodder is for jury.* It is a question of fact for the jury whether the purchaser of brewery refuse, intended for cattle feed, was in the exercise of ordinary care in failing to take measures to ascertain the nature of a poisonous whitish substance in a railroad car and in the feed, when three other persons besides such purchaser noticed such substance in the feed and on the bottom of the car and bought it from the consignee for the purpose of feeding it to their cattle, and actually fed it to them.

6. **SALES, § 241***—*when rule of caveat emptor inapplicable in action against third person.* The rule of *caveat emptor* does not apply in an action against a carrier, by a purchaser from the consignee for damages for loss of cattle due to the presence of white lead in brewery refuse, intended for cattle feed, as a result of contamination due to an unclean car.

Appeal from the County Court of Cook county; the Hon. ISAAC HUDSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement by the Court. This is an action brought by Henry Grandt, Jr., and Louis Witt, appellants and hereinafter referred to as the plaintiffs, against the Chicago, Burlington & Quincy Railroad Company, appellee and hereinafter referred to as the defendant, to recover damages arising out of a violation of its legal duty imposed upon defendant as a common carrier, to furnish cars suitable for the purpose for which they were to be used, which, in the case at bar, was the transportation of cattle feed. Suit was originally begun against defendant and one James H. Murphy, who will hereinafter be designated as the consignor. Upon the trial below plaintiffs dismissed as to the consignor,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and on motion of the defendant at the close of plaintiffs' case, the court instructed the jury to find defendant not guilty, upon which verdict the court entered judgment against the plaintiffs for costs, to reverse which plaintiffs have prosecuted this appeal.

The amended declaration consisted of five counts which, in substance, charged that on or about the 19th day of September, 1913, defendant owned and operated a railroad in the city of Chicago extending to other places; that Murphy, the consignor, a dealer in dairy feed known as malt grain or brewer's refuse used as cattle feed, ordered a car from the defendant in which to ship such cattle feed to a dealer at Wheeling, Illinois, to be sold by said dealer to farmers as cattle feed; that defendant, well knowing what use the car was intended for, was duty bound to furnish a clean, wholesome car suitable for the purpose for which it was intended, but, notwithstanding such knowledge and duty, defendant carelessly and negligently furnished a car which contained in the bottom and on the sides a poisonous substance known as white lead, by reason of which the feed loaded in said car became contaminated; and that the said Murphy, also a party defendant, carelessly and negligently loaded said feed into the car so furnished by the defendant railroad company; that plaintiffs, who had purchased some of the said feed, while in the exercise of due care, fed the same to their cattle, some of which became sick and died from the effects thereof; and that by reason of the negligence of the defendant aforesaid, plaintiffs sustained damages.

Defendant filed two pleas; one joining the issues, and one denying the possession and use of the railroad as alleged in the amended declaration. Plaintiffs joined issue on these pleas. On this state of the record, it is unnecessary to set forth the pleas filed by Murphy, the consignor.

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The evidence offered on behalf of the plaintiff showed that Murphy, the consignor, at the time of the trial (which took place during April, 1914), had been dealing in cattle feed for thirteen years, during which period it had been his custom to ship brewer's refuse, for cattle feed, over defendant's lines; that in September, 1913, he contracted to ship a load of such refuse to one Henry Grandt, Sr., at Wheeling, Illinois, and for that purpose, on or about September 19, 1913, ordered a car from defendant; that on or about the said day, the employees of said consignor hauled the brewer's refuse from the Atlas, National, Garden City and Gambrinus brewing companies to the defendant's team track at Nineteenth street and Western avenue, for the purpose of loading same into the car for shipment to Wheeling; that when they arrived at defendant's yards and asked which car had been placed there for use by the consignor, the yard boss designated a certain car for that purpose; that said employees cleaned said car with shovels and brooms, whereupon said refuse was loaded therein. The evidence further showed that the shipment reached Grandt at Wheeling on or about the 21st of September; that said Grandt sold part of the contents thereof to the plaintiffs; that when the various purchasers of said refuse (including the plaintiffs) loaded same from the car into their wagons they noticed a white or greyish substance at the bottom of the car, being from two to four inches thick, some of which had become mixed with the said brewer's refuse; that plaintiffs, not knowing the nature of this whitish substance, and having no reason to suspect that it was harmful, commenced feeding the refuse, in which it was contained, to their cattle on or about the 23rd of September, and that about the 3rd day of October they observed their cattle had become sick, five of which died a short time thereafter; that in the interim the cattle had no other feed; that this substance appeared white and lumpy; that samples of the feed containing

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this whitish substance taken from the car were analyzed by a chemist, who found that said whitish substance contained a mineral substance known as lead carbonate or white lead, which was poisonous, and would produce disease, derangement or death if taken in sufficient quantities; that several veterinary surgeons who had made a post mortem examination were of the opinion that the cattle had died from lead poisoning or some poisoning occasioned by eating white lead; that the said refuse, when obtained from the breweries was in good and wholesome condition, free from any poisonous substances; that the wagons in which it was hauled from the breweries to the car and from the car to plaintiffs' premises at Wheeling were clean and free from harmful and poisonous substances, as was also the malt box in which the refuse was kept by the plaintiffs; that there was no white lead anywhere on the plaintiffs' premises where the cattle were fed or herded. Plaintiffs also showed by the three witnesses who testified that they had observed this whitish substance at the bottom of the car and that it had become mixed with the refuse, that their cattle were also fed this refuse.

HUGO J. THAL, for appellant; RICE, LOWES & O'NEILL, of counsel.

J. A. CONNELL, for appellee; CHESTER M. DAWES, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

While the record does not show the argument advanced by defendant in the court below in support of its motion for a directed verdict, yet it is fair to presume that there, as here, it relied in the main on the contention that even though the jury could, from the facts in evidence, reasonably have concluded that the defendant furnished the car containing the white lead, and further, that it knew the purpose for which the car

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was to be used, yet inasmuch as plaintiffs were not parties to the contract and there was no privity between plaintiffs and the defendant, the former could not be heard to complain of that fact, notwithstanding it was negligent. Plaintiffs, in their contention, do not claim to have been parties to the contract, nor that there was any privity between themselves and the defendant, but insist that as the defendant knew the purpose for which this car was to be used, there was a duty imposed upon it by law, to furnish a car suitable for the said purpose, and that consequently it was liable for its failure to perform such duty, not only to the person with whom it had contracted to furnish said car, but to any person who might be injured because of its failure to perform that duty; that the failure to perform that duty was an original wrongful act which would naturally, in the ordinary course of events, prove injurious to some other person or persons, for which it would be liable if there was no intervention by any independent agency contributing to the injury.

There is no controversy between the parties that the plaintiffs could not maintain this action by reason of any contract of carriage. The question at issue is the right of plaintiffs to recover for the original wrongful act of the defendant, independently of contract. The principle of law that an action of tort may lie for a breach of duty imposed by law independently of any contract is abundantly supported by authority. In *Cooley on Torts* (2nd ed.), p. 76, it is said:

“If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent.”

And again the same author says on page 83:

“There is a maxim that ‘fraud is not purged by circuit,’ and this is true of any wrongful act.”

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This principle of law was also well set forth in the case of *Davidson v. Montgomery Ward & Co.*, 171 Ill. App. 355. There, as in the case at bar, plaintiff was not a party to the contract and it was therefore contended that he could not sue. In the course of a well-considered opinion, many authorities are cited, among which is the case of *Cunningham v. C. R. Pease House Furnishing Co.*, 74 N. H. 435, in reference to which Mr. Justice Baldwin, the writer of the opinion, said (p. 370) :

“This was an action which was brought by a daughter to whose mother the representations were made. The plaintiff’s evidence in the case tended to show that certain manufacturers of a stove blacking advertised it in Nashua, stating that it was for sale by the defendants; the plaintiff’s mother saw the advertisement, called at the defendant’s store and asked a clerk if the blacking they were advertising was intended for stovepipes or for stoves. He replied that it was intended for stoves, and said, ‘The warmer the stove, the better it works.’ She replied, ‘Won’t that be fine; I can black my stove without letting my fire go out.’ Relying upon the representations that the blacking could be safely used on a hot stove, the mother bought a can. Two days later, the plaintiff, a member of her mother’s family, used some of the blacking on a hot stove and an explosion resulted, causing the injuries complained of. The plaintiff and her mother were blamelessly ignorant of the fact that the blacking contained naphtha. In the opinion the court says: ‘*The defendant’s position is like that of one who “puts destructive * * * materials in situations where they are likely to produce mischief.” Ricker v. Freeman, 50 N. H. 420, 432. Such a person must respond in damages to those who are injured because of his acts, if he either knew or ought to have known that the materials were dangerous and that the persons injured might come in contact with them. Hobbs v. Company, ante [74 N. H.] 116; Scott v. Shepherd, 3 Wils. 403; S. C. 2 W. Bl. 892; Cooley on Torts, 78. (Italics ours.)*

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“ ‘Although the defendants probably did not have the plaintiff in mind when they sold the blacking to her mother, they knew the mother bought it to use on her stove and that other members of the family were likely to use it, consequently the plaintiff can recover, if her mother could have recovered, had she been injured instead of the plaintiff.’ * * * ”

Another case cited was that of *Thomas v. Winchester*, 6 N. Y. 397, wherein a dealer in drugs sold another druggist a jar of belladonna, labeling it “Extract of Dandelion,” from which the second druggist filled a prescription for “Extract of Dandelion.” The patient took the medicine containing the belladonna, and an action by him against the first seller of the deadly drug was sustained. Therefore, in the case at bar, if there were facts in evidence from which the jury might say or might reasonably infer that defendant knew, or in the exercise of ordinary care should have known, that the car in question contained a poisonous substance known as white lead, and furthermore, knew, or should have known, the purposes for which said car was to be used, then it was its duty, as a matter of law, to anticipate the consequences that might naturally and properly follow its act in furnishing such a car for the purposes intended, viz., that anyone buying the refuse might feed same to his live stock. If the jury might further infer from the evidence that plaintiffs sustained injury from said act on the part of the defendant, by which they were damaged, and that said injury was a natural and probable consequence of such act, then under the principle of law above cited, defendant would be liable for the said injury. After a careful review of the evidence, we are of the opinion that the jury might reasonably have inferred from said evidence that defendant had, or in the exercise of reasonable care should have had, knowledge that the car designated by the defendant in which to ship this cattle feed contained a poisonous substance known as white

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lead, and that when it designated said car for use by the plaintiffs, it had, or should have had, knowledge of the purposes for which it was intended. Therefore, as already stated, it was its duty, as a matter of law, to anticipate the consequences that might naturally and properly flow from its act in furnishing such car to the consignor for shipment of the cattle feed. We are further of the opinion that there was evidence from which the jury might reasonably have inferred that the injury sustained by the plaintiffs, for which damages are sought, was the consequence that the defendant should have anticipated would naturally and probably flow from the act complained of, and furthermore, that there was no evidence of the intervention of an independent agency contributing to said injury.

Defendant cannot shield itself from responsibility by claiming that the plaintiffs were not parties to the contract under which this car was furnished, because defendant was charged with the knowledge that not only the person with whom it had contracted might sustain injury, but that any other person who would buy the feed transported in said car would sustain injury. Defendant was a common carrier, charged, under the law of our State, with the duty to furnish suitable cars for the transportation of persons and their property; and plaintiffs, purchasing said cattle feed at Wheeling, had the right to believe that defendant had performed such duty.

Defendant further contends that the consignor, with whom it had contracted for furnishing the car in question, had taken upon itself the duty of cleaning the car, thereby relieving it of any responsibility in connection therewith. The only evidence to support such contention was that of two employees of the consignor who testified that they always cleaned the cars furnished for cattle feed, and that on the occasion in question they cleaned the car with shovels and brooms. This testimony, however, was not evidence of an agreement

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on the part of the consignor to clean the car, nor was it conclusive on the question whether or not the car was clean when loaded, but was merely evidence of facts which might have been taken into consideration by the jury had they been permitted to pass upon the issues. Moreover, even though the consignor had agreed to clean said car, that would not relieve the defendant, as far as the plaintiffs are concerned, of its duty, imposed by law, to furnish a car suitable for the purpose for which it was intended. The act of the consignor in cleaning the car was the act of the defendant. *Chicago & A. R. Co. v. Davis*, 159 Ill. 53, 58.

Defendant further maintains that plaintiffs had knowledge of the presence of this whitish substance in the bottom of the car and in the cattle feed removed therefrom; that in failing to take measures to ascertain the nature thereof, they were not in the exercise of ordinary care, thereby contributing to the injuries sustained. On this point, taking into consideration the evidence that three persons besides the plaintiffs, who had noticed this whitish substance on the bottom of the car and in the refuse, bought it for the purpose of feeding the same to their cattle, and did so, the question whether or not plaintiffs acted as ordinarily prudent men would have acted under like circumstances, was also one of fact for the jury and not a question of law for the court.

Defendant further contends that, this being an action to recover damages for an injury arising out of the sale of feed for animal consumption, the rule of *caveat emptor* applies, and that under the facts in evidence the plaintiffs cannot recover. In our view of the issues as heretofore expressed, this contention is without force.

For the reasons hereinabove assigned, we are of the opinion that the issues should have been submitted to the jury, and that the trial court erred in directing a

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verdict for the defendant. Accordingly, the judgment will be reversed and the cause remanded.

Reversed and remanded.

Frank M. J. Kirn, Appellee, v. Chicago Journal Company, Appellant.

Gen. No. 20,933.

1. **MASTER AND SERVANT, § 707***—*when question of existence of relation is for the jury.* In an action by a policeman, who was riding on a wagon carrying newspapers for a certain daily newspaper publishing company during a strike of drivers for various daily newspapers, for damages for personal injuries sustained as a result of the alleged negligence of the driver in turning to the left to cross in front of an oncoming street car, *held* that under the evidence it was a question for the jury whether the driver was the servant of the newspaper publishing company or the servant of a certain delivery company.

2. **MASTER AND SERVANT, § 682***—*sufficiency of evidence as to existence of relation.* In an action for damages for personal injuries against a newspaper publishing company by a policeman who was riding on a delivery wagon during a strike of the drivers of various daily newspapers, and who was injured as a result of the alleged negligence of the driver in attempting to cross the street in front of an oncoming street car, evidence *held* sufficient to sustain a finding that the driver was the servant of the newspaper publishing company, and not of the delivery company.

3. **PLEADING, § 458***—*when question of variance is waived.* The question of variance between the proof and allegations in a declaration is waived where no objection or motion is made on such question but a motion is made simply to direct a verdict, and for a new trial, and exceptions taken to the overruling of such motions.

4. **EVIDENCE, § 107***—*when telephone conversation is admissible.* A telephone conversation is admissible where material and relevant to the issues of a case.

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 6, 1915. Rehearing denied October 15, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kirn v. Chicago Journal Co., 195 Ill. App. 197.

Statement by the Court. This is a suit for personal injuries brought by Frank M. J. Kirn, appellee and hereinafter referred to as the plaintiff, against the Chicago Journal Company, appellant and hereinafter designated as the defendant, and the Chicago City Railway. On the trial below, at the close of all the evidence, the court instructed the jury to return a verdict of not guilty as to the Chicago City Railway. The case was then submitted to the jury, who found defendant guilty, assessing the plaintiff's damages in the sum of \$750. To reverse the judgment entered on this verdict, defendant has prosecuted this appeal.

CHYTRAUS, HEALY & FROST and EDWIN WHITE MOORE, for appellant.

ROBERT L. STEPHENS, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

At the time of the accident there was a strike involving the drivers delivering for various daily papers published in the city of Chicago. Because of the strike in question, plaintiff, a police officer, while in the performance of his duty as such, was riding upon a wagon which at the time of the accident carried papers of the defendant and the Chicago Daily News. This wagon had printed on its sides the name of the defendant. The driver of the wagon, one Myron, had started out at 2:15 from the barn, which was located at 139-141 West Sixty-third street, and had driven to the Illinois Central Railroad station on East Sixty-third street, between Washington and Madison avenues and stopped on the south side of the street in the subway under the Illinois Central Railroad tracks, where he left the wagon, returning after a few moments with bundles of newspapers which were to be delivered. The wagon, with Myron on the right-hand side and plaintiff on the left-hand side of the seat, was then driven east on the south side of the street. Just in front of it another

wagon was standing close to the curb, whereupon Myron passed it on the left-hand side, his wagon remaining, however, to the south of the south rail of the eastbound track of the Chicago City Railway. He then suddenly turned his horse on to the track as if to turn and go west, and as he started to do this, a car of the Chicago City Railway Company approached from the west ringing its bell, and some one hollered, but before the said Myron could either complete the turn he had started to make, or get off the track, his wagon was struck by the car, causing the plaintiff to be thrown from the wagon, whereby he sustained the injuries complained of.

Defendant admits in its brief that the accident was caused by the negligence of either Myron, the driver, or one Kerrigan, motorman of the car that collided with the wagon, thereby absolving plaintiff from any blame in connection with the accident. While defendant, in the course of its argument in support of its various contentions as to why the judgment should be reversed, complains of the action of the court in instructing the jury to find the Chicago City Railway Company not guilty, no error is predicated thereon.

Defendant first contends that the court erred in refusing to hold as a matter of law that Myron was not the servant of the defendant at the time of the accident, and, in urging this contention, relies upon the following principle of law: "Where a driver for a horse and wagon is hired from anyone who has him in his general employ and has the power to discharge him, the employer and not the hirer is liable for the driver's negligence." Defendant claims that the evidence shows that the driver Myron was in the general employ of the Chicago Delivery Company alone; that said company alone had the authority to discharge him; that the only control defendant had over said Myron was to give directions as to when and where deliveries were to be made; that at the time of the

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accident said Chicago Delivery Company was, as to the defendant, an independent contractor for the delivery of its newspapers in the city of Chicago. Defendant therefore argues that under the principle of law heretofore stated it was not liable for the driver's negligence. Plaintiff contends, however, that there was no proof of the existence of the alleged Chicago Delivery Company; that, moreover, if there was, the said Chicago Delivery Company was but an agent for all newspapers in Chicago in securing drivers during the strike; that the control of the said Chicago Delivery Company was in the various newspapers including the defendant, and that the defendant had the right to discharge the driver, Myron, or any other driver it had secured through the Chicago Delivery Company. In considering these various contentions, it becomes necessary to review the facts having a bearing thereon. Prior to the strike the Chicago Journal, defendant herein, delivered its papers, independently of any other company publishing and delivering newspapers, through one Pierce who had a contract for the delivery of newspapers, but who, during the strike, refused to have, and did not have, anything to do with furnishing the drivers, but continued to furnish wagons and horses. After the strike, deliveries of all afternoon papers were made from one wagon. One of the depots for delivery was a barn located at 139-141 West Sixty-third street, whence deliveries were made of all newspapers for that section of the city, at the time of the accident. Plaintiff placed upon the stand one Claude Draper, who stated that in May, 1912, he had charge of deliveries at the aforesaid barn; that he had business dealings with defendant at that time only through its drivers; that at this barn there was a representative of the defendant by the name of Kirby, who directed the drivers as to their routes and gave them their route slips; that he (Draper) received his pay from the contractor, Pierce; that on May 23rd he talked with

a representative of the defendant, whom he called Eckstein, but whose name the evidence shows was Eckstrom, concerning the drivers; and when asked what that conversation was, answered: "Well, he would send me the drivers; he told me that if the drivers were not satisfactory to send them back to him and he would replace them with better drivers"; that Myron was sent out to him on the day of the accident with a note from Eckstrom directing that he (Myron) be given a wagon that morning; that he (Draper) had nothing to do with paying these drivers; that he never had anything to do with the pay slips; that Eckstrom stated that "when a man didn't suit to send them to him, he would pay them off." Draper further testified that after the accident he talked with Eckstrom about the injury the horse had received in said accident, and Eckstrom wanted to know how badly the horse was hurt, and upon being told the horse would be laid up about six weeks, Eckstrom told him to leave the horse where it was until it was ready for work again, and to send the bill to him and he would settle. These conversations, testified to by Draper, were had with Eckstrom over the telephone. Plaintiff also called Eckstrom, who testified that at the time of the accident he was circulation manager of the defendant; that Pierce refused to have anything to do with furnishing the drivers during the strike; that that matter was turned over to the Chicago Delivery Company who, in that regard, was acting for all the papers. He stated further, that many times during the strike he was in telephone communication with the barn at Sixty-third street and may or may not have talked with a man by the name of Draper; that an employee of the defendant by the name of Kirby was at the barns all day, whose duty it was to send drivers out on their various routes; that if notified by Kirby that a driver had not appeared, he would call up the Chicago Delivery Com-

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pany's office and get another driver. When asked who the Chicago Delivery Company was, he stated:

"I don't know who they are, except they were organized at that time to take care of the Chicago newspapers.

"Q. How long did they stay in existence? A. How long were they in existence?

"Q. Yes. A. They came in existence, I think, the first or the second week of the strike."

Eckstrom was then further cross-examined as follows:

"Q. Did the Chicago Journal Company, the defendant in this case, on the 23rd of May, 1912, have in its employ a driver named Myron? A. They did.

"Q. The Chicago Journal? A. The Chicago Journal?

"Q. Yes. A. A man named Myron on the joint delivery had been in Woodlawn. He was on one of Pierce's wagons.

"Q. In whose employment was he? A. He was paid by the Chicago Delivery Company.

"Q. Who hired him? A. Mr. Taylor, I think, hired him.

"Q. Who was Mr. Taylor? A. He was manager, or director, I don't know which, of the Chicago Delivery Company.

"Q. He had nothing to do with the Chicago Journal Company? A. Excepting to supply us with drivers.

"Q. Taylor hired all the drivers? A. Practically all of ours.

"Q. And the Chicago Delivery Company paid those men their salaries? A. Yes, they were paid—what we did was this, in order to secure the money for these men on their pay morning, we paid them, and then our pay-roll went over to the Chicago Delivery Company and I presume the Chicago Delivery Company was reimbursed."

As we read the foregoing evidence, it does not present a situation such as is set forth in the various cases cited by defendant in support of its contention, viz.: *Chicago Hydraulic Press Brick Co. v. Campbell*, 116

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Ill. App. 322, and *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514, and in a later case not cited by counsel, viz., *Connolly v. People's Gas Light & Coke Co.*, 260 Ill. 162, in each of which cases the alleged independent contractors had furnished, in some instances horses, wagons and drivers, and in others horses and drivers, and there was no question but that the person so furnishing the equipment was one entirely separate and apart, having no connection with the business of the person with whom it had contracted to do the teaming and delivering. In the case at bar, plaintiff made out a *prima facie* case by showing that the wagon, which was in charge of Myron on the day of the accident, bore the name "Chicago Journal." The evidence showed that it was operated for delivering papers published by the defendant. This was at least *prima facie* evidence of the possession and control of the wagon by the defendant. *East St. Louis Connecting Ry. Co. v. Altgen*, 210 Ill. 213; *Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill. 406. We realize that defendant contends that plaintiff was not content with simply showing those facts, but also showed that the said Myron was furnished by the Chicago Delivery Company; and that the said Chicago Delivery Company was independent of the defendant and that he was furnished under a contract with the Chicago Delivery Company. While there was some categorical evidence by Eckstrom, the acknowledged employee of the defendant, that the Chicago Delivery Company did furnish the drivers, yet neither the court nor the jury were compelled to accept that statement as conclusive on the question whether or not the Chicago Delivery Company was in fact an independent contractor. They had the right to take into consideration the further facts that the Chicago Delivery Company was organized to furnish drivers during the strike for all the newspapers; that its offices were located in the building of one of the newspapers; that Eckstrom did not

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know who the Chicago Delivery Company was, save that a man named Taylor was its general manager or director; that the said Eckstrom had told the man in charge of wagons and horses for Pierce at the barn on Sixty-third street, that if drivers sent out by him were not satisfactory, he would replace them with better drivers; that all he had to do if a man did not suit him, was to send him back and he would pay him off; the fact that these men were paid by defendant; and that Myron was put to work upon the direct request, in writing, of Eckstrom. The court and jury might well have concluded from the conversation between Eckstrom and Draper that Draper's act in sending back a driver was equivalent to a discharge of the driver, and that when Eckstrom stated that he would pay them off and send better drivers, that he, Eckstrom, had the power to discharge the drivers. From all of the evidence the court and jury might further have reasonably concluded that the Chicago Delivery Company was not an independent contractor, but merely an agency representing the various newspapers in securing drivers during the emergency created by the strike. Defendant produced no employee or officer of the so-called Chicago Delivery Company, nor evidence of a single transaction of any original hiring of or of final payments to drivers alleged to have been furnished by said Chicago Delivery Company. Clearly, under this evidence, the court could not say, as a matter of law, that the said Myron, at the time of the accident, was the employee of an independent contractor, but it rightfully placed before the jury the question whether the said Myron was an employee of the defendant or of an independent contractor. Plaintiff's evidence was *prima facie* sufficient to prove the fact that the said wagon, at the time of the accident, was in possession and control of the defendant, and we cannot say that there was proof of facts in the record sufficient to overcome this *prima facie* case. Defendant had it within

its power, if there was a written contract between it and the Chicago Delivery Company, to produce same, also to produce the officers and employees of that company to show what its business was or how it was conducted; having failed therein, defendant cannot now fairly complain of the jury's finding on the issues, nor of the court's action in refusing to direct a verdict in its favor.

Defendant further contends that the court erred in not directing a verdict for it, on the ground that the declaration alleged that the driver was negligent in not getting his wagon off the track, while the only act of negligence which the evidence tended to prove was, that the horse was driven on the track in front of an approaching car; that therefore the negligence proven was at variance with the negligence as charged in the declaration, and that such variance between the proof and the allegations was fatal to a recovery, because the rule is well established that the plaintiff cannot recover upon proof of an act of negligence different from that alleged in the declaration. That such is the law we have no doubt, but the question of variance, unless raised in apt time, is waived. In all the cases cited by defendant, the objection to such evidence was made in apt time. However, in the case at bar, no objection on this ground was made to the introduction of the evidence at the time it was offered, nor was there a motion made to instruct the jury to find for the defendant because of such variance. Defendant does not claim, in its brief, to have raised any objection or made any motion because of the variance now complained of; it merely concludes its argument upon that point by saying that at the close of the plaintiff's case and at the close of all the evidence, appellants submitted a motion to direct a verdict, and also that said motion was denied and that exceptions were taken to the rulings on said motions as well as on the motion for a new trial. The defendant having failed to predicate an

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objection or base any motion upon the question of variance, it has clearly, under the decisions of this court and our Supreme Court, waived all questions of variance. *Chicago City Ry. Co. v. Phillips*, 138 Ill. App. 438; *City of Chicago v. Bork*, 227 Ill. 60; *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 511.

Defendant complains of the 16th instruction given on behalf of the plaintiff. The main objection against this instruction is that the court submitted to the jury the question whether or not Myron was the servant of the defendant, instead of holding as a matter of law that he was not its servant. We have already held that the court did not err in its ruling. While defendant, in the course of its argument, sets forth several other reasons why this instruction is bad, we, however, believe that it correctly stated the law, under the facts in the case, and that defendant's contention in regard thereto is not well taken.

Defendant also complains of the ruling of the court in admitting in evidence and submitting to the jury the telephone conversation testified to by Draper. Under the rule as laid down in *Godair v. Ham Nat. Bank*, 225 Ill. 572, the telephone conversation was admissible if material and relevant to the issues. That we have so regarded it is evident by our reference thereto in passing upon the first contention of the defendant.

Finding no reversible error, the judgment of the Circuit Court will be affirmed.

Affirmed.

In re Petition of R. O. Witzke, Appellant, v. Frederic Greer, Appellee.

Gen. No. 20,948. (Not to be reported in full.)

Appeal from the County Court of Cook County; the Hon. JOHN E. OWENS, Judge, presiding. Heard in the Branch Appellate Court at

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the October term, 1914. Reversed and remanded. Opinion filed October 6, 1915.

Statement of the Case.

Petition by R. O. Witzke against Frederic Greer for release from arrest under the Insolvent Debtors' Act (J. & A. §§ 6198-6250 inc.), petitioner having been arrested for failure to satisfy a writ of *capias ad satisfaciendum* after judgment against him in an action of trover. From a judgment denying the petition, the petitioner appeals.

On November 5, 1913, a writ of replevin was issued from the Municipal Court of Chicago on behalf of Frederic Greer, appellee, and against A. E. Armstrong and R. O. Witzke, the latter being the appellant, for the recovery of an automobile. The property not being recovered, on November 20th, in the same action, plaintiff filed a statement of claim in the usual and customary form used in an action of trover, alleging damages in the sum of \$275.

To this statement of claim defendant filed an affidavit of merits, setting forth, in substance, that he became the purchaser of the said automobile at a public sale held by the bailiff of the Municipal Court of Chicago under a writ of execution issued by the said Municipal Court. Upon the conclusion of the trial, plaintiff presented a motion in writing to instruct the jury to find the issues in his favor, accompanied with the following instruction:

"The court instructs the jury to find the defendant guilty and assess the plaintiff's damages at the sum of two hundred and seventy-five dollars (\$275) in trover."

The court, however, refused to direct a verdict in that form, but gave the jury the following form of verdict with directions to sign same:

"We, the jury, find the defendants, H. E. Armstrong and R. O. Witzke, guilty of having maliciously, wil-

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fully and intentionally, and with intent to injure and defraud the plaintiff converted to defendants' own use, the goods and chattels of the plaintiff and assess the plaintiff's damages at the sum of two hundred and seventy-five dollars (\$275),'' which was returned by the jury and judgment rendered thereon by the court. Said judgment and costs not having been paid, a *capias ad satisfaciendum* was issued and served upon the defendant. Upon his failure to satisfy the writ, defendant was taken into custody. On the same day he filed his petition for release from such arrest, under the Insolvent Debtors' Act (J. & A. ¶¶ 6198 *et seq.*), and was released on a bond conditioned upon his appearance on the hearing of said petition. On the hearing before the court all the papers in the original replevin suit were produced, viz.: The affidavit, writ and bond, plaintiff's statement of claim, defendant's affidavit of merits, the motion for a directed verdict presented by the plaintiff, the form of verdict as set out in said motion, also the verdict returned by the jury at the direction of the court, and the judgment issued thereon. Upon this state of the record defendant asked the discharge of the defendant on his petition, insisting that malice was not the gist of plaintiff's action. Plaintiff maintained the contrary, insisting that trover is an unlawful conversion of property and that the verdict of the jury found defendant guilty of having maliciously, wilfully and with intent to injure and defraud the plaintiff, converted to his own use the goods and chattels of the plaintiff, and that judgment having been rendered thereon, said judgment was *res adjudicata* on the question whether malice is or is not the gist of the action. The court held that malice was the gist of the action, and upon that ground remanded defendant to the custody of the sheriff.

C. A. FITCH, for appellant.

McINERNEY, POWER & BYRNES, for appellee.

Case v. Emerson-Brantingham Co., 195 Ill. App. 209.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. **EXECUTION, § 295***—*how question of malice determined.* The question whether malice is the gist of an action so as to entitle a debtor who has been arrested for failure to satisfy a writ of *capias ad satisfaciendum* to a release from imprisonment upon petition under the Insolvent Debtors' Act (J. & A. §§ 6198-6250 inc.), must be determined from the face of the record when the record affords the means of such determination.

2. **JUDGMENT, § 454***—*when question as to malice res adjudicata.* If it appears from the pleadings in an action that malice was the gist of the action, the doctrine of *res adjudicata* applies as to the question whether or not malice was or was not the gist of the action.

3. **TROVER AND CONVERSION, § 7***—*what is gist of the action.* The gist of an action in trover is the conversion of the property.

4. **TROVER AND CONVERSION, § 37***—*what proof essential.* All that need be shown in a count sounding in trover is the ownership of the property in the plaintiff, that it came into the possession of the defendant, and that the defendant converted it to his own use.

5. **EXECUTION, § 294***—*when release of judgment debtor in trover proper.* A judgment debtor who has been arrested upon a *capias ad satisfaciendum* after failure to pay a judgment in an action in the Municipal Court is entitled, upon petition under the Insolvent Debtors' Act (J. & A. §§ 6198-6250 inc.), to be released from custody where the statement of claim clearly shows that the action is one of trover, since malice is not the "gist" of such an action.

6. **EXECUTION, § 295***—*when verdict cannot supply malice.* The verdict in an action in the Municipal Court cannot supply the element of malice or fraud unless they appear in the statement of claim either expressly or impliedly.

Frederick H. Case, Plaintiff, v. Emerson-Brantingham Company, Defendant.

Emerson-Brantingham Company, Appellant, v. George A. Donnelly, Intervening Petitioner, Appellee.

Gen. No. 20,326.

ATTORNEY AND CLIENT, § 119*—*how amount of attorney's fee computed on settlement direct with client.* An agreement between an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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attorney and his client provided that the client would pay the attorney for his services in a certain matter a sum of money "equal to one-half of whatever amount is received as damages out of said claim." It was *held* that on a direct settlement between the parties of the claim to which the agreement related the attorney was entitled to receive from the defendant an amount equal to one-half of the amount for which the defendant had settled with the client, not an amount equal to that which the client had been paid. Following *Czecziotka v. Hammond Glue Co.*, 185 Ill. App. 559.

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETIT, Judge, presiding. Heard in this court at the March term, 1914. Reversed and judgment here. Opinion filed December 21, 1914.

RALPH F. POTTER, for appellant.

RANKIN, HOWARD & DONNELLY, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

This is a claim for an attorney's lien where the defendant made a settlement direct with the plaintiff, the attorney's client. Plaintiff agreed with his counsel "to pay me (the attorney) for said services a sum of money equal to one-half of whatever amount is received as damages out of said claim or cause of action." The amount which defendant paid plaintiff was \$160. Defendant tendered the attorney \$80, which was refused, the attorney claiming that he was entitled to \$160. The trial court held with the attorney, and judgment for \$160 was entered.

This court has heretofore construed a contract similar to this in the case entitled *Czecziotka v. Hammond Glue Co.*, 185 Ill. App. 559, and we are not persuaded by the able argument of counsel either that that decision was erroneous or that this case can be distinguished from that. Applying what we there said to the facts now before us, if the plaintiff, Case, after receiving \$160 from defendant had offered to pay his attorney the amount he had agreed to pay him, namely, "one-half of whatever amount is received," clearly the attorney would not be entitled to more than \$80 from

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his client. How then can it be said that should Case fail to pay his attorney this amount, the defendant, who, under the statute, thereupon became burdened with Case's promise, is obligated for double this amount? That this cannot be so seems to us self-evident. The amount of the liability of defendant in this case is determined by the amount of the liability of the plaintiff to his attorney.

We hold that the judgment was erroneous, but as the error in the judgment affects only the amount, judgment will be entered here against appellant for \$80, costs here to be paid by appellee.

Reversed and judgment here.

Warren Sales Company for use of Warren Boat Company, Appellee, v. J. L. Shaw, Appellant.

Gen. No. 20,659. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 15, 1915. Rehearing denied November 5, 1915.

Statement of the Case.

Action of the first class in the Municipal Court of Chicago by Warren Sales Company for the use of Warren Boat Company, a corporation, against J. L. Shaw, defendant, to recover \$1,450, balance alleged to be due under a contract for the manufacture and delivery of a hydroplane, and also for the sum of \$240.66, for other goods sold and delivered. Defendant filed an affidavit of merits denying that plaintiff made and delivered the hydroplane as per contract and denying that there was due from defendant to plaintiff \$1,450 or any other sum of money, and alleging that plaintiff was indebted to defendant for failure to deliver the

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hydroplane on May 1, 1913, as provided in the contract, and that by reason of such failure defendant was entitled to recover from plaintiff the sum of \$5 per day "as provided in the contract." Defendant also filed a "statement and affidavit of claim on set-off," the items of which aggregated \$1,772.61. To this plaintiff filed an affidavit of merits. The case was tried by the court without a jury, and the issues were found against defendant and plaintiff's damages were assessed at the sum of \$1,152.71. A motion for a new trial was overruled and judgment was entered on the verdict. From this judgment, defendant appeals.

ELA, GROVER & MARCH, for appellant; FRANK R. GROVER, of counsel.

WILLIAM A. JENNINGS, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 482*—*when record does not present question of law for review.* Where, on appeal from a judgment of the Municipal Court of Chicago in an action of the first class tried without a jury, no complaint is made as to any ruling of that court on any question of pleadings nor upon the admission or exclusion of evidence, nor upon any matter arising during the course of the trial, and no written propositions of law were submitted to the court, the record presents no question of law for the consideration of the Appellate Court.

2. APPEAL AND ERROR, § 1410*—*when finding not against weight of evidence.* Evidence on appeal from judgment by Municipal Court for plaintiff in action of first class, considered and *held* that finding of trial court was not manifestly against weight of evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Scheltes v. Hunter, 195 Ill. App. 213.

S. Adrian Scheltes, Appellee, v. Thomas M. Hunter, Appellant.

Gen. No. 20,836. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 15, 1915. Rehearing denied October 26, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Replevin by S. Adrian Scheltes, trustee, plaintiff, against Thomas M. Hunter, bailiff, defendant. On submission of the case, by agreement, to the court without a jury, the court found defendant guilty and that plaintiff was entitled to possession of the property, and assessed plaintiff's damages at one cent. A motion for new trial was overruled, and from judgment entered on the finding, defendant appeals.

The evidence shows that on December 30, 1911, Nate Schatz, who was engaged in the clothing business in the city of Chicago, under the name and style of "Bart Clothing Company," executed and delivered to S. A. Scheltes, as trustee, a certain deed of trust purporting to be an assignment for the benefit of the creditors of Schatz. The deed conveyed to the trustee all his merchandise, furniture and fixtures, cash, bills and accounts receivable, and other property owned by him in connection with the said business. At the time of the execution, Schatz was owing a large amount of money, practically all of it to eleven creditors, one of whom was Rose, Rogers and Rose, a corporation, that held a claim amounting to \$2,649.06, and the deed was executed in pursuance of an arrangement made at a meeting of certain of the creditors of Schatz, and was ratified and assented to by ten of the said eleven creditors. There was a conflict in the evidence as to whether Rose, Rogers and Rose ratified and assented to the assignment. Immediately after the execution of

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the said deed, the trustee took possession of the property conveyed and appears to have conducted the business from that time until the date of the trial. On May 4, 1912, Rose, Rogers and Rose recovered a judgment against the said Schatz, in the Municipal Court of Chicago, in the sum of \$2,671. Execution was issued on this judgment and placed in the hands of Thomas M. Hunter, the bailiff of said court, who, on or about June 4, 1912, seized 400 suits of men's clothing in the hands of the said trustee.

The declaration consists of the usual counts in replevin. The defendant filed two pleas; the first averring that the property replevined was the property of Nathan Schatz and not of the plaintiff, the second averring justification of the seizure as bailiff of the said court under a writ of execution in full force and effect, issued by the said court on the said judgment in favor of Rose, Rogers and Rose. To these pleas the plaintiff filed a replication.

The defendant contended "that the alleged assignment for the benefit of creditors is void because it tends to hinder, delay and defraud creditors. Being void, no title to any property of Schatz passed to Scheltes, the plaintiff in this replevin action"; that the goods seized by the defendant as bailiff of the Municipal Court were in fact the goods of Schatz, and that the trial court erred in rendering judgment in favor of the plaintiff. The defendant further contended that "the plaintiff did not establish an estoppel by a preponderance of the evidence."

The plaintiff contended: "1. The deed of trust was not made to hinder, delay and defraud creditors, and was not fraudulent or void. 2. A preponderance of the evidence clearly establishes that the deed of trust was made with the full knowledge and acquiescence of Rose, Rogers and Rose, and, therefore, was and is binding upon them. 3. The goods seized by the bailiff under the execution were goods purchased by S. Adrian

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Scheltes, as trustee, and were not subject to seizure under execution against Nate Schatz, the original assignor, even though the original conveyance to the trustee were fraudulent and void.”

The defendant contended that even if it be conceded that Rose, Rogers and Rose, with full knowledge of the assignment, acquiesced therein, nevertheless, the conveyance is absolutely void because “it permitted the trustee to carry on the business; it authorized him to purchase new merchandise and render the trust estate liable for any loss or profit that would be made out of the new merchandise; it authorized him to pay all expenses incurred by him in the conduct of the business irrespective of whether the expenses were necessary or not; it absolutely required the trustee to employ Schatz and pay him \$50 per week; it required the trustee to pay premiums on the life insurance taken out on the life of Schatz; it authorized the trustee to make sales of goods on credit; it limited the liability of the trustee.”

G. L. WIRE, for appellant.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. FRAUDULENT CONVEYANCES, §155*—*when valid inter partes*. A conveyance made to defraud creditors is valid *inter partes*.

2. FRAUDULENT CONVEYANCES, §180*—*when voidable*. Even as to creditors who are not parties to an assignment and who do not assent to its being made, a fraudulent assignment is not void but only voidable.

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS, §32*—*when assenting creditor cannot attack assignment*. A creditor who has full knowledge of the making of an assignment for the benefit of creditors and acquiesces therein is bound by the assignment and cannot attack it

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as a fraudulent conveyance, such assignment being neither void nor voidable as to him.

4. **ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 32***—*when evidence sufficient to show valid assignment.* In a replevin suit to recover property alleged to have been assigned for the benefit of creditors, evidence examined and *held* sufficient to show that the assignment had been made with the knowledge and acquiescence of the defendant in replevin.

**James G. Trainer and William O. Trainer, Appellants,
v. Alfred L. Baker, Appellee.**

Gen. No. 19,296. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed and remanded. Opinion filed October 15, 1915. Rehearing denied November 16, 1915.

Statement of the Case.

Action by James G. Trainer and William O. Trainer, copartners, plaintiffs, against Alfred L. Baker, defendant, to recover \$22,500 claimed to be due plaintiffs for services as real estate brokers in selling certain property. There were two trials in the Superior Court, a verdict for plaintiffs for \$17,500 being returned in the first, and a verdict for defendant being returned in the second. From a judgment on the second verdict, plaintiffs appeal.

There was evidence tending to prove that in 1907 plaintiffs were authorized in an interview had by one of them with defendant to offer the property for sale to any person whom they might think would buy, for the price of \$1,000,000, and that a commission of two and one-half per cent. upon that price would be paid them, if they "found a purchaser for the property." There was also evidence tending to prove that plaintiffs submitted the property to several prospective purchasers,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

one of whom was Leon Mandel; that plaintiff James G. Trainer learned from Mr. Mandel that he would be willing to pay \$1,000,000 for the whole property, including an outstanding leasehold estate for which the tenant was demanding \$150,000; that thereupon said Trainer asked defendant if he would be willing to sell the property for \$850,000, subject to the lease, which defendant declined to do; that this reply was reported to Mr. Mandel, who then suggested that he would be willing to buy if defendant would take back a mortgage on the property at a low rate of interest for part of the purchase price, but this was also refused by defendant, who said that he "wanted to sell it for cash," and that plaintiffs "might be able to borrow the money from somebody at a low rate of interest"; that Mandel then said that as the holiday season was approaching, he was "pretty busy" and would do nothing further until after the first of the year, when he "would take it up" again; that Trainer saw Mandel again in January, 1908, but the latter would not make any better offer than he had made; that Mandel thereafter went to California and was gone until May, 1908, leaving word with Trainer to let him (Mandel) know at Santa Barbara, California, if, in the meantime, defendant would consent to accept his offer of \$1,000,000 for the whole property; that during Mandel's absence, Trainer succeeded in getting the tenant to reduce his price to \$137,500 for the leasehold interest; that upon Mandel's return to Chicago in May, the matter was again discussed with him, but without any result; that in September or October, 1908, Trainer again called on Mandel, but Mandel then said that "he did not know whether he would be in a position to buy anything for some time," and that consequently he was "not interested at the present time"; that in the meantime, however, Mandel had also been negotiating with a broker named Strauss, who had agreed with Mandel to divide his commissions with Mandel's son-in-law, who was

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also in the real estate business; that in October or November, 1908, Mandel telephoned to another broker named Bacheldor, who had also talked with him about the property, and authorized Bacheldor to negotiate with defendant for the purchase of the property, agreeing to pay Bacheldor a commission of \$10,000, on condition that half of it should be paid to Mr. Mandel's son-in-law; that as the result of Bacheldor's negotiations, a written contract of sale was entered into between defendant and Mandel, in January, 1909, by the terms of which Mandel agreed to pay \$900,000 for the property, subject to the existing lease, and to pay a commission to Bacheldor, and also agreed to save defendant harmless "from any and all claims for commissions arising out of the sale of said premises," and to defend any suit that might be brought to recover any such commissions.

The court, at the request of defendant, instructed the jury "that this is a suit between James G. Trainer and William O. Trainer on the one side and Alfred L. Baker on the other and between no one else, and that this is not a suit against Leon Mandel," and that "The question simply is whether defendant Baker is liable under the evidence and the instructions of the court to the plaintiffs in this case. You should not, therefore, overlook this fact nor find a verdict against defendant Baker simply because Leon Mandel agreed with defendant and his cotrustees to indemnify and hold them harmless from any and all claims for commission arising out of the sale of the property in question in this case to said Leon Mandel; nor simply because of the fact that defendant and said trustee paid no commission for the sale of said property; nor simply because of the fact, if you find it to be a fact from the evidence, that Mandel paid, or agreed to pay, \$10,000 as commission, one-half to E. A. Bacheldor and one-half to Joseph Wineman."

The fifth and eighth instructions given on behalf of defendant told the jury generally that before they could find for the plaintiffs, they "must find and believe" from the evidence "that Leon Mandel was induced to buy the property in question in this case by and through the efforts of plaintiffs, and that plaintiffs were the efficient and procuring cause of said sale being made to said Mandel, and that their work, in fact, caused the said Leon Mandel to purchase said property, and that without their efforts and work, he would not have purchased the same." Following this general statement, the instructions go on to say that it is not sufficient for the plaintiffs to show that they called Mandel's attention to the property, gave him the price and description, and tried to sell it to him before he bought it, but that the plaintiffs "*must go further and prove by a preponderance or greater weight of the evidence, that they were the direct and procuring cause of the purchase of said property by said Leon Mandel.*"

By the fourth instruction given on behalf of defendant, the jury were told that if they find from the evidence "that defendant agreed to pay to plaintiffs a real estate commission of two and one-half per cent., in case they found a purchaser, and completed and consummated a sale of the property in question in this case to such purchasers; and you further find from the evidence that plaintiffs did not consummate and complete the sale of the property in question in this case to the purchaser thereof, Leon Mandel, then and in the event you find the foregoing from the evidence, plaintiffs cannot recover in this case, even though you may find from the evidence that they endeavored to sell said property to said Mandel, and communicated to defendant the fact that they were endeavoring so to do."

There was some evidence tending to prove that after the plaintiffs had begun negotiations with Mandel, and

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had succeeded in inducing him to consider the property favorably, the sale was consummated and completed by him through another broker for the purpose of obtaining a personal advantage, or a lower price, by making it appear that plaintiffs were not entitled to a commission, and that defendant knew that such was the fact.

The fourteenth instruction, in its first three paragraphs, purports to set forth all the facts constituting the basis of the plaintiff's claim, and then adds, in a fourth paragraph, the following: "The jury are instructed that even though you may find the foregoing facts from the evidence, nevertheless, plaintiffs cannot recover in this case unless you believe from the preponderance or greater weight of the evidence, the burden of proof being upon plaintiffs, that they were the direct and procuring cause of the purchase of said property by said Leon Mandel."

LEE D. MATHIAS and CHARLES H. ROBINSON, for appellants.

JUDAH, WILLARD, WOLF & REICHMAN, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 81*—*when instruction singling out particular facts improper.* An instruction which singles out particular facts and gives them undue prominence has a tendency to mislead and confuse the jury and is improper.

2. INSTRUCTIONS, § 48*—*when instruction as to weight and effect of evidence improper.* In an action by brokers to recover commissions on the sale of real estate, an instruction which states that it is not sufficient for the plaintiffs to show that they called the purchaser's attention to the property, gave him the price and description and tried to sell it to the purchaser before he bought it, but that plaintiffs "must go further and prove by a preponderance or greater weight of the evidence that they were the direct and procuring cause of the purchase of said property" by the purchaser is objectionable, in that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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It singles out isolated facts, telling the jury that such facts are not enough to prove the issue, invades the province of the jury and is argumentative and misleading.

3. INSTRUCTIONS, § 133*—*when omission of reference to theory of cause improper.* An instruction which omits all reference to a theory of the facts which, in truth, would entitle plaintiffs to recover is erroneous.

4. INSTRUCTIONS, § 48*—*when instruction on facts improper.* In an action by brokers to recover commissions on the sale of real estate, an instruction which contains a repeated inference amounting to an assertion that the facts enumerated therein are not in themselves sufficient to prove that plaintiffs were in fact the procuring cause of the sale, which was the principal issue in the case, is erroneous.

5. TRIAL, § 124*—*when argument of counsel improper.* Evidence examined and *held* that statements made by counsel in his argument to the jury were of such character as to arouse the passion and prejudice of the jury, the effect of which was not removed by the action of the court in finally sustaining an objection.

6. TRIAL, § 128*—*when argument of counsel improper.* It is improper for counsel in argument to the jury to state facts which are not in evidence, and especially to fortify such statements by personal asseveration as to their truth.

John F. Devine, Administrator, Appellee, v. Eli Pfaelzer, Appellant.

Gen. No. 20,975. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed October 15, 1915. Rehearing denied November 1, 1915. Modified opinion filed December 22, 1915.

Statement of the Case.

Action by John F. Devine, administrator of the estate of Philip Fitzpatrick, deceased, plaintiff, against Eli Pfaelzer, defendant, to recover damages for the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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death of plaintiff's intestate. From a judgment for plaintiff, defendant appeals.

The evidence shows that defendant left his horse and buggy standing at the curb on Calumet avenue, near Forty-seventh street, in the city of Chicago. The horse ran away, going east on Forty-seventh street to St. Lawrence avenue, and then north. Fitzpatrick was standing in front of a building on the west side of St. Lawrence avenue near Forty-sixth street, and attempted to stop the runaway, but was thrown to the ground, and injured so seriously that he died the next morning. The evidence on behalf of defendant tended to prove that when he left the horse and buggy on Calumet avenue, he attached a heavy strap and twenty-five pound weight to the horse's bit; that some children were playing "horse" on the sidewalk and gave a signal to start; that the horse started off, dragging the weight, then began to run and broke the strap, and that a piece of the strap was dangling from the bit when the horse was finally stopped. On the other hand, two of plaintiff's witnesses, who saw the accident from a window of a building on St. Lawrence avenue, testified that at the time of the accident there was no strap hanging from the horse's head except the reins which were wrapped around the whip in the buggy. An ordinance of the city of Chicago was introduced in evidence, which prescribes a penalty for leaving in any public street of the city, a horse to which any vehicle is attached, "without securely fastening such horse." There was also evidence that St. Lawrence avenue is in "a populous section" of the city, with residence buildings on both sides of the street.

It further appeared from the evidence that just before the accident, Fitzpatrick was standing with a man and woman on the sidewalk when the runaway approached; that no other persons were in sight upon the street in the direction in which the horse was going; that Fitzpatrick and the other man ran into the street

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to stop the horse; that they stood about eight feet apart, one on each side of the apparent path of the runaway, Fitzpatrick two or three feet behind the other man; that as the horse approached, the first man waved his arms, and the horse swerved and ran into Fitzpatrick and knocked him down.

JOHN A. BLOOMINGSTON, for appellant.

JAMES C. McSHANE, for appellee.

MR. JUSTICE FITCH delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 185*—*when evidence establishes prima facie case.* In an action against the owner of a horse to recover for the death of plaintiff's intestate caused by being struck by such horse while it was running away, evidence that the horse was running away unattended in a public street of a city together with the introduction of an ordinance of the city prohibiting the leaving in any street a horse to which a vehicle is attached without securely fastening the horse, establishes a prima facie case of negligence on defendant's part.

2. NEGLIGENCE, § 76*—*whether risking life to save another contributory negligence.* The rule that a person has the right to risk his own life in an effort to save the life of another without being chargeable with contributory negligence is limited to cases where the attending circumstances and conditions are such as to afford a reasonable basis for the belief that it is necessary to take such a risk in order to save another from personal injury or death.

3. NEGLIGENCE, § 188*—*when evidence sufficient to show contributory negligence.* Evidence, in an action to recover for death of plaintiff's intestate through being knocked down by a runaway horse while trying to stop it, examined and held sufficient to support a finding that deceased was guilty of contributory negligence.

ON MOTION TO AMEND JUDGMENT.

4. APPEAL AND ERROR, § 1806*—*when remanding order struck out.* Where, on an action to recover for the death of plaintiff's intestate, plaintiff recovers judgment which, on appeal, is reversed and remanded, the reversal being solely on the ground that the intestate was guilty of contributory negligence as a matter of law, and there-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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after plaintiff files in the Appellate Court a motion to strike out the remanding portion of the order and, in support of the motion, admits of record that he would be unable to prove on any further trial that intestate "was in the exercise of ordinary care for his own safety either before or at the time of his injuries, besides, or in addition to the facts or circumstances, which were proven at the last trial of the cause," the remanding part of the order will be struck without regard to whether or not the other party consents thereto.

Charles Husche, Jr., Appellee, v. Chicago Iron & Metal Company, Appellant.

Gen. No. 20,959. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed October 15, 1915.

Statement of the Case.

Conversion by Charles Husche, Jr., plaintiff, against Chicago Iron & Metal Company, a corporation, defendant. From a judgment by the court without a jury for plaintiff for \$1,175, defendant appeals.

The evidence shows that in February, 1911, a fire occurred at the place of business of one A. L. Dawson, a dealer in secondhand machinery, by which the greater part of the machinery there located was so damaged as to render it unfit for further use as such. Plaintiff contended that such machinery was sold by Dawson to the defendant, a dealer in scrap iron, having two yards, known respectively as Halsted street and Lake street yards; that at the time of the fire, he had on consignment with the said Dawson a lot of secondhand laundry machinery which had been placed in merchantable condition by Dawson; that the fire rendered necessary the removal of the machinery from Dawson's premises; that defendant, in the course of the negotiations for the purchase from Dawson of what the de-

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fendant designated as "machinery cast scrap," agreed to permit the said laundry machinery to be stored in its Lake street yard without reward; that in accordance with said agreement, said laundry machinery was taken to the yard of the defendant; that thereafter defendant refused to return it on demand and converted same to its own use.

Defendant contended that plaintiff did not show that this property ever came into its possession; further, that as to said property, even though it came into its possession, it was a bailee without reward, and the plaintiff failed to show by a preponderance of the evidence that the property was lost through the gross negligence of the defendant; and, finally, that the property in question was part of the property purchased from the said Dawson, and for which it had paid.

On behalf of the plaintiff, the testimony showed that shortly after the fire, Dawson called at defendant's place of business for the purpose of selling the machinery which had been rendered unfit for further use as such, and that he talked with one Santowsky, president of the defendant, who afterwards called at Dawson's premises; that Dawson showed him what he had for sale; that they discussed and arrived at terms of sale; that the sale was confirmed by letter from defendant to Dawson, a carbon copy of which was introduced in evidence and reads as follows:

"Phones: Monroe 156. Yards: 817-819 W. Lake St.
Monroe 4251. 732-734 W. Lake St.

Orders by mail or phone promptly attended to.

Chicago Iron & Metal Co.

Incorporated.

Wholesale Dealers in

Scrap Iron and Metals,
Second-Hand Machinery.

209-211-213 N. Halsted St.

Office: 213 N. Halsted St.

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Chicago, Mar. 11, 1911.

Mr. A. L. Dawson,
Chicago.

Dear Sir:

We hereby confirm purchase of all machinery cast scrap contained in building located number 217 N. Desplaines St. at \$11.00 per net ton. We enclose our check for \$50.00 to apply on account.

Very truly yours."

Plaintiff's evidence also shows that while the property sold was being taken away from Dawson's place of business, the said Dawson stated to Santowsky that there was certain laundry machinery there which would have to be removed; that he would like to find some place to leave it until he could make arrangements to dispose of it; that thereupon Santowsky stated that he might store same in defendant's yard, without any charge; that thereupon defendant hauled this laundry machinery to its Lake street yard, for which hauling a charge was made and paid by said Dawson; that in endeavoring to dispose of the property, he (Dawson) had occasion to call at defendant's yard five or six weeks afterwards, and saw the laundry machinery there; that thereafter he occasionally saw the property in the defendant's yard; that on a later occasion, within a year from the time it was moved there, he again visited the yard of the defendant but could not find the property; that thereafter he endeavored to see Santowsky but was unable to do so, but succeeded in seeing the bookkeeper, who stated he knew nothing about it; that thereupon letters were written on behalf of the plaintiff, asking information with reference to the property and requesting its return; that no answer was made or any explanation given as to its whereabouts or disposition; that the reasonable fair cash market value of said property was about \$1,175.

On behalf of the defendant, Santowsky denied having had any conversation with Dawson relative to the stor-

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age by defendant of the machinery in question. There was further testimony that all the machinery that was delivered either at its Lake street or at its Halsted street yard was part of the property purchased under the above letter, and had been paid for; that said laundry machinery, even though it was intact and usable, was considered as machinery cast scrap; furthermore, that no money was paid defendant for hauling the laundry machinery to its Lake street yard. While Santowsky denied having had a conversation with Dawson relative to the storage of this laundry machinery, he admitted that in a conversation with the said Dawson at the time of the negotiations that led up to the agreement embodied in the letter aforesaid, he (Dawson) stated: "All the machines that is there that have any good, we will take away, the rest we can pick out." There was no evidence on the part of the defendant as to the value of the property in question.

BERNARD MARGOLIS, for appellant.

GEORGE E. DAWSON, for appellee.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

TROVER AND CONVERSION, § 39*—*when evidence sufficient to support verdict. Evidence in action for conversion of laundry machinery examined and held sufficient to support verdict.*

**Chalmers Motor Company of Illinois, Appellee, v.
Edgar F. Seney, Appellant.**

Gen. No. 20,979. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. **JAMES C. MARTIN**, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed with statutory damages. Opinion filed October 15, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Chalmers Motor Co. of Ill. v. Seney, 195 Ill. App. 227.

Statement of the Case.

Action by the Chalmers Motor Company of Illinois, a corporation, plaintiff, against Edgar F. Seney, defendant, to recover the balance due on a promissory note for \$1,376, dated May 17, 1913, signed by defendant and payable to the plaintiff, due six months after date. To the amended statement of claim an affidavit of merits was filed on May 26, 1914. This was stricken from the files and leave granted the defendant to file an amended affidavit of merits, which was done June 4th. On June 10th the court, on motion of the plaintiff, struck the amended affidavit of merits from the files and defendant was defaulted for want of a sufficient affidavit of merits, whereupon the court assessed plaintiff's damages in the sum of \$1,205.22, for which the court entered judgment; to reverse which defendant has prosecuted this appeal.

Said amended statement of claim set forth that on April 23, 1913, plaintiff and defendant entered into a written contract for the sale and purchase of an automobile and certain accessories, said contract being in the form of a letter and acceptance and was as follows:

“April 23, 1913.

Mr. Edgar F. Seney,
111 W. Monroe St., Chicago, Ill.

Dear Sir:

We propose to deliver to you F. O. B. cars Detroit:
One 1913 Chalmers Six Cylinder 4 passenger
Torpedo type, gray touring car, duplicate
of one shown you today, for the net sum of \$2400.00
Plus freight to Chicago..... 20.00
Nobby treads on rear at extra cost of..... 26.30
One extra Nobby tread tire and tub..... 52.50
One tire cover for tire..... 3.50
Monogram as selected to be put on gratis.

Total.....\$2502.30

Chalmers Motor Co. of Ill. v. Seney, 195 Ill. App. 227.

We accept your 1912 '36' car complete with tire, tubes, tools and all accessories, except clock, in good operative condition, as at present equipped, in part payment at \$1,126.30. The balance to be paid in six monthly installments of equal amounts, to be dated from date of delivery of car. Said balance to be evidenced by notes bearing interest at six per cent. Delivery to be made on or about May 1st.

We to have winter top.

Respectfully submitted,

CHALMERS MOTOR CO. OF ILLINOIS.

Charles E. Gregory, Manager.

This proposal accepted this 23rd day of April, 1913.

EDGAR F. SENEY."

Plaintiff further stated that in May, 1913, the automobile described in said written contract was delivered to the defendant, and that during the same month defendant signed a promissory note for the balance due plaintiff in accordance with the terms of the contract; that subsequently, and prior to, December 15, 1913, plaintiff performed work for and furnished materials to the defendant for use on said automobile, to the value of \$296; that prior to December 15, 1913, defendant complained to plaintiff concerning the condition of said automobile and the charge made by plaintiff for the work done and material furnished as aforesaid; that on December 15, 1913, defendant entered into an agreement in writing concerning payment of the note and the charges for said work and material. This agreement was as follows:

"Dec. 15, 1913.

Mr. Edgar F. Seney,
111 W. Monroe St., Chicago, Ill.

Dear Sir:

Responding to your proposal of even date, offering a plan of settlement of your open account and promis-

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sory note, it will be agreeable to us to extend payment of your note and account as follows:

You are to pay us \$500.00 this month to be applied in settlement of your open account in amount \$296.00, less credit notation made by the writer on statement which you have in your possession, the balance of said \$500.00 to be endorsed on promissory note, in amount \$1,376.00, dated May 17, 1913. You are also to pay \$500.00 on promissory note in January, 1914, and the balance due on said promissory note is to be paid in February, 1914.

Respectfully submitted,

CHALMERS MOTOR CO. OF ILL.,

CHAS. E. GREGORY,

General Manager.

This proposal accepted this.....day of December, 1913.

EDGAR F. SENEY."

The statement continued, that the credit notation referred to in said agreement was a credit of \$24.11, leaving a balance due on the open account referred to in the terms of the agreement of \$271.89; that on January 10, 1914, defendant paid plaintiff on said open account \$271.89, and \$228.11 on the amount due on said note; that no other payments were made by defendant, and that there was then due plaintiff the sum of \$1,205.22 on said note.

The amended affidavit of merits filed by defendant did not deny the making of either the original contract under date of April 23rd or the agreement of December 15th, but alleged that plaintiff, under the original agreement, warranted the car to be first class in every respect, but that said car did not come up to said alleged warranty but was of inferior grade and did not run as warranted by plaintiff; that thereupon defendant returned the automobile to plaintiff, who agreed to repair same and put it in first-class condition; that on or about the 15th of December, when plaintiff pre-

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sented its bill for repairs to said machine, defendant objected, and thereupon it was agreed by and between the parties that if defendant would pay \$500, \$271.89 to be applied for labor and material, and \$228.11 on account of note sued on, plaintiff would guaranty and warrant that defendant would have no further trouble with said car and that same would be in good and perfect condition; that thereupon defendant entered into the agreement of December 15th; that plaintiff, however, did not fulfil said warranty, and that therefore said automobile was of far inferior grade, and that defendant thereby was entitled to a recoupment from plaintiff for the amount still due on said note.

ADAMS, CREWS, BOBB & WESCOTT, for appellant.

GARNETT & GARNETT, for appellee; CYRUS L. GARNETT, of counsel.

MR. PRESIDING JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 244*—*when incorporation of warranty in written contract essential.* A warranty must be incorporated in a written contract of sale in order to be a part thereof.

2. CONTRACTS, § 389*—*when question whether instrument in suit a contract one of law.* In an action on a contract claimed to be contained in correspondence between the parties, it is for the court to determine, in passing upon a motion to strike defendant's amended affidavit of merits setting up a parol warranty, whether or not the letter alleged to contain the contract and the acceptance thereon constituted a written contract and, if so, whether it fully expressed the agreement between the parties.

3. CONTRACTS, § 51*—*when instrument constitutes contract.* In an action on a contract claimed to be contained in a letter and the acceptance thereon, the letter and acceptance *held* to show a complete legal obligation without any uncertainty or ambiguity as to the obligation or extent of the engagement, and to contain the whole agreement of the parties.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Christensen v. Bartelmann Co., 195 Ill. App. 232.

4. **SALES, § 244***—*when affidavit setting up warranty properly stricken.* In an action on a written contract which contains no warranty, a motion to strike an amended affidavit of merits, the only issue presented by which is as to whether or not plaintiff had entered into a warranty, is properly allowed.

5. **DAMAGES, § 227***—*when motion for assessment by jury made too late.* A motion, in an action on a contract, to have the damages assessed by the jury is too late when not made until after the court had assessed plaintiff's damages and entered judgment.

6. **COSTS, § 67***—*when damages allowed for vexatious appeal.* Evidence examined and *held* to show that an appeal was prosecuted merely for delay, and ten per cent. damages allowed.

Carl Christensen, Appellee, v. R. W. Bartelmann Company, Appellant.

Gen. No. 21,943. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. C. H. BOWLES, Judge, presiding. Heard in this court at the October term, 1914. Appeal dismissed. Opinion filed October 25, 1915.

Statement of the Case.

Motion to dismiss an appeal by defendant from the judgment of the Circuit Court in a proceeding by Carl Christensen, plaintiff, against R. W. Bartelmann Company, defendant, in a proceeding under the Illinois Workmen's Compensation Act of 1911 (J. & A. ¶ 5449 *et seq.*), for lack of jurisdiction.

J. A. BLOOMINGTON, for appellant.

J. J. SONSTEBY, for appellee.

PER CURIAM.

Abstract of the Decision.

APPEAL AND ERROR, § 25*—*when Appellate Court without jurisdiction of appeal from Circuit Court in action under Compensation Act.* The Appellate Court has not jurisdiction of an appeal from a judg-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nelson v. Miller et al., 195 Ill. App. 233.

ment of the Circuit Court rendered in an action under the Workmen's Compensation Act of 1911 (J. & A. ¶ 5449 *et seq.*). Following *Lavin v. Wells Bros. Co.*, No. 20,799, 195 Ill. App. ??.

Frank Nelson, Defendant in Error, v. Albert Miller and E. Percy Miller, trading as Albert Miller & Company, Plaintiffs in Error.

Gen. No. 20,062. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Action by Frank Nelson, plaintiff, against Albert Miller and E. Percy Miller, copartners, trading as Albert Miller & Company, defendants, to recover the purchase price of three cars of hay sold by plaintiff to defendants. The defenses set up were that the quality was not as represented and unreasonable delay in making the shipment. Defendants also claimed as a set-off damages by reason of delay in the shipment.

Plaintiff introduced evidence, which was uncontradicted, showing that a representative of defendants, who were engaged in business in Chicago, spent "a couple of hours" on top of the hay examining it at plaintiff's ranch near Potomac, Montana, examined it all and then told plaintiff he would purchase it. Plaintiff also showed that he was under no obligation as to delivery beyond loading the hay at Potomac. Defendants placed no witnesses on the stand and asked no questions of any of them.

The jury, under instructions of the court, returned a verdict for plaintiff in the amount of \$259.77, and against defendants' set-off. To reverse the judgment entered thereon, defendants prosecute this writ of error.

Devine v. Chicago & W. I. R. Co. et al., 195 Ill. App. 234.

W. KNOX HAYNES and MICHAEL FEINBERG, for plaintiffs in error.

BAKER & HOLDER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 279*—*when misrepresentation as to quality of goods not a defense.* Where the purchaser of goods inspected the goods and thereafter agreed to purchase them, he cannot set up a failure of quality as a defense to an action for the purchase price.

2. SALES, § 199*—*when delay in delivery not a defense.* Where the evidence shows that the seller of goods was under no obligation as to delivery beyond loading the goods at the place, delay in hauling the goods to the purchaser after they were loaded is not a defense to an action for the purchase price.

3. TRIAL, § 68*—*what insufficient offer of proof.* The engaging by counsel in a discussion with the court without placing any witnesses on the stand or questioning any does not constitute an offer of evidence.

4. TRIAL, § 68*—*what not a refusal to admit evidence.* Remarks of the court in a discussion with counsel do not constitute a refusal to admit evidence where no witnesses are questioned and none placed on the stand.

5. APPEAL AND ERROR, § 1420*—*when error without prejudice.* On appeal, in an action to recover the purchase price of cars of hay, a difference in the weights of the bales in the cars is not a ground for reversal where the trial court accepted the weights claimed by defendants and instructed the jury to return a verdict on that basis.

John F. Devine, Administrator, Plaintiff in Error, v. Chicago & Western Indiana Railroad Company and Belt Railway Company of Chicago, Defendants in Error.

Gen. No. 20,375. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Trespass on the case by John F. Devine, administrator of the estate of Vladislav Paszkowsky, deceased, plaintiff, against Chicago & Western Indiana Railroad Company and the Belt Railway Company of Chicago, defendants, alleging that defendants, by their servants, with force and arms, assaulted plaintiff's intestate, causing his death. The jury returned a verdict finding defendants not guilty, on which verdict the court entered judgment. To reverse this judgment, plaintiff prosecutes this writ of error.

The defendants entered a special plea *son assault demesne* and the plaintiff a replication *de injuria absque tali causa*.

The testimony tended to show that in the evening of February 14, 1905, Wirsing, a special policeman, employed about their tracks by defendants, and two other special policemen saw two men stealing coal from cars on defendants' tracks. The officers followed them and Wirsing overtook the two men, who were carrying the stolen coal in sacks. One of the men was plaintiff, who is described as the "big man." While there is some slight conflict in the testimony, Wirsing's story in the main is uncontradicted. He says that he showed his star to these two men and demanded the return of the coal but they dropped their sacks and "tackled" him. He says that he had offered no violence to them up to that time. Wirsing drew a revolver and fired in the air, as he says, to attract the attention of the other two officers. His story of the affair from that point, in substance, is as follows:

"With that the big man broke away from me and ran into what I afterwards found to be his yard. I fought the little man into his yard, where we were met by the big man. The big man had an ax and threw it at me, striking the fence. In the meantime the little man backed away from me and disappeared and my time was taken up with the larger man of the two. He ran

Devine v. Chicago & W. I. R. Co. et al., 195 Ill. App. 234.

into the shed and got a shovel, and I went into the shed after him and tried to get the shovel away from him, at the same time telling him to 'drop that.' I fired another shot into the fence, thinking thereby to make him drop it. About a few minutes after that we kept on struggling and he attacked me with the shovel and he struck me in the right hand. I had the revolver in my hand pointed directly at him when he struck me on the hand. It exploded and the shot struck him on the knee. After that he rallied and drove me into the alley."

On cross-examination the witness said that plaintiff struck him several times with the shovel, and also "he struck the gun. When the gun went off I was not trying to fire the gun at all." Other witnesses gave testimony tending to corroborate Wirsing, and it seems to have been proven beyond serious doubt that the firing of the revolver was simultaneous with the blow on the hand in which it was held from the shovel wielded by plaintiff. From the facts in evidence we would have little trouble in concluding that the actual firing of the shot was not the intentional act of defendants' servant, but was accidental as regards them.

ARTHUR C. BACHRACH and BRUNDAGE, LANDON & HOLT, for plaintiff in error.

C. G. AUSTIN and BEVERLY W. HOWE, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. ACTION ON THE CASE, § 1*—*when evidence sufficient to support verdict.* Evidence in action of trespass on the case to recover for death of plaintiff's decedent by assault by defendants' servants, examined and *held* to support verdict for defendants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Falberg v. Continental Casualty Co., 195 Ill. App. 237.

2. APPEAL AND ERROR, § 1526*—*when ruling of court harmless error.* Ruling of court upon instructions examined and *held* harmless error. BAKER, J., dissenting.

Hattie Falberg, Defendant in Error, v. Continental Casualty Company, Plaintiff in Error

Gen. No. 20,407.

1. INSURANCE, § 205*—*when misrepresentation in application as to name of applicant invalidates contract.* A false statement in an application for life insurance as to the applicant's name invalidates the contract of insurance.

2. INSURANCE, § 821*—*when misrepresentation in application as to relationship of beneficiary invalidates contract.* Where an applicant for insurance states in his application that the beneficiary is his "wife," whereas she is not his wife, but a woman with whom he is sustaining illicit relations, the misrepresentation invalidates the contract of insurance.

3. INSURANCE, § 365*—*when tender of return of premiums not essential.* In an action by the beneficiary of a policy of life insurance against the insurer, the latter is not required to return the premiums to the beneficiary or the wife of the insured as a condition to setting up misrepresentations in the application for insurance as a defense, the title to the premiums being in the personal representative of the insured.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 1, 1915.

MARTIN P. CORNELIUS and GEORGE R. SANDERSON, for plaintiff in error; MANTON MAVERICK, of counsel.

ADAMS, CREWS, BOBB & WESCOTT, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

This is a suit on an accident insurance policy. On the trial the court instructed the jury to find the issues for the plaintiff and to assess the damages at \$1,000. Judgment was entered on the verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Falberg v. Continental Casualty Co., 195 Ill. App. 237.

The application for insurance is in part as follows:

"I hereby apply for insurance in the Continental Casualty Company based upon the following statements, and I agree that any failure on the part of myself, my heirs, legal representatives or beneficiary to comply with the provisions, conditions and agreements of this Application, or of any policy issued hereon, shall work a forfeiture of the policy and all claims thereunder. * * *

"1. Name, Henry Falberg. * * *

"6. Beneficiary to take interest under the policy only at death of applicant. (Give full Christian name, relationship and residence.) Name, Hattie..... Relationship, wife."

"I understand and agree that I have made each of the above statements as a material representation to induce the issue of a policy for which I have made this application, and to that end I warrant each of them to be full, complete and true, and declare that no statement contradictory thereto was made by me to the agent of said company, and that all statements made to him are embodied herein. * * *

"In Witness Whereof, I have hereunto set my hand this 6th day of September, 1911.

"(Signed)

Henry Falberg, Applicant.

"L. B. Halsted, Witness."

The defense is misrepresentation by the insured in that (1) his name was not Henry Falberg, but that it was in fact Knut Lindblom, and (2) that Hattie Falberg was not his wife. The evidence sufficiently supported these defenses. It was proved that prior to the making of the application the insured, whose real name was Knut Lindblom, had deserted his lawful wife, Mary Lindblom. Mrs. Lindblom testified that there had never been a divorce, and her statement was corroborated by other evidence. The fact that plaintiff sustained illicit relations with the insured did not make her his wife, and the claim that the representation meant merely that she sustained the "relation of wife" to insured, and hence was true, is not convinc-

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ing. The plain meaning of the language used in the application is that the beneficiary was in fact and in law the wife of the insured. *Duenser v. Royal Arcanum*, 262 Ill. 475.

Whether considered as warranties or as representations, the statements as to applicant's name and as to the relationship of the beneficiary are so material that falsity therein invalidates the contract of insurance. The necessity to an insurance company of true information as to the identity of the party to be insured and the identity and relationship of the beneficiary is too obvious to require argument. Cases precisely in point are *Continental Casualty Co. v. Lindsay*, 111 Va. 389, and *Gaines v. Fidelity & Casualty Co.*, 188 N. Y. 411. In the latter case the court in its opinion said: "The insurer was entitled to know the actual relationship, which the person, for whom the assured desired the benefit of the insurance contract, sustained to him; for it bore upon the risk which it was to assume."

The court instructed the jury that the defendant could not make these defenses because it had not paid back either to the wife or to the plaintiff, or to some other person, the premiums it had received. In the recent case of *McKinney v. Metropolitan Life Ins. Co.*, 191 Ill. App. 592, citing many cases, we have held that neither the husband, wife nor beneficiary was entitled, to the return of premiums, but that the title to them was in the personal representative of the deceased. The trial court was in error in its instruction as to the law. No such representative is a party to this litigation. Plaintiff has no right to the premiums, and cannot complain because they have not been returned to someone else. We note in the brief for the defendant that it offers to return these premiums "upon demand to the proper qualified representative of the insured estate."

Because of these misrepresentations made by the insured in his application there can be no recovery on

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this policy, and the judgment is reversed without remanding the cause.

Reversed.

**Leonard C. Reid, Administrator, Defendant in Error,
v. Samuel B. Lingle, Plaintiff in Error.**

Gen. No. 20,470. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 1, 1915.

Statement of the Case.

Action by Leonard C. Reid, administrator of the estate of George Upton, deceased, plaintiff, against Samuel B. Lingle, to recover for the death of plaintiff's intestate. Judgment was rendered for plaintiff. To reverse the judgment, defendant prosecutes this writ of error.

Plaintiff in his statement of claim charged that defendant had control of a flat building; that the father of the deceased occupied a flat therein; that a fire was started near the premises, on which defendant's janitor threw rubbish; that the fire ignited the clothing of plaintiff's intestate, then slightly over four years of age, who was passing by, and that he was so severely burned that he died. Defendant denied that the janitor ever started the fire in question or threw rubbish on it, and sought to introduce testimony tending to show that the child had set himself on fire.

No eyewitness testified to having seen the child catch fire or that he was dangerously near the spot where the fire is said to have been. The existence of the fire itself was sharply controverted. The fire was said to have been on a vacant lot near the flat building. A

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heavy gate shut off the passageway from the courtyard of the flat building to this lot. The last seen of the child before the accident was by a young girl who testified that she opened this gate and allowed the child to go through the gateway and that she then closed the gate, leaving him outside. About an hour afterwards he was discovered by his mother inside the courtyard with his clothes burning.

ERNEST SEVERY, for plaintiff in error.

LITZINGER, MCGURN & REID, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 68*—*when evidence of past transactions inadmissible.* In an action to recover for the death of a child alleged to have been caused by the negligence of defendant's janitor in the manner of burning rubbish whereby plaintiff's decedent received injuries resulting in his death, evidence that defendant had been seen before that time burning garbage at various times when children were near is harmful error where it is not claimed that defendant made the fire causing the death or was on the premises or knew anything about it.

2. EVIDENCE, § 68*—*when evidence of ordinance inadmissible.* In an action to recover for the death of a child alleged to have been caused by the negligence of defendant's janitor, it is error to permit plaintiff to introduce in evidence a section of the ordinance of the city of Chicago making the building of a bonfire in any street or alley an offense punishable with fine, where the evidence showed that the location of the fire had nothing to do with the accident and tended, furthermore, to show that the fire was on a vacant lot.

3. EVIDENCE, § 73*—*when exclusion of evidence rebutting inference error.* Where, in an action for the death of a child alleged to have been caused by the negligence of defendant's janitor in burning garbage, there is no direct evidence as to how the child's clothing caught fire, it is error to exclude evidence that at different

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gibbons v. Grossman et al., 195 Ill. App. 242.

times before the accident the child had been found with matches which had been taken from him and that he had several times set fire to his clothing with them.

Mrs. E. J. Gibbons, Defendant in Error, v. Allen Grossman and Leopold E. Phillips, Plaintiffs in Error.

Gen. No. 20,591. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 1, 1915.

Statement of the Case.

Action by Mrs. E. J. Gibbons, plaintiff, against Allen Grossman and Leopold E. Phillips, defendants, to recover damages claimed to have been sustained by misrepresentations of defendants as to a fur coat purchased of them by plaintiff. To reverse a judgment for plaintiff, defendants prosecute this writ of error.

Defendants filed an appearance and an affidavit of defense denying that any representations as claimed had been made. The case was duly set for trial, and on that date the plaintiff appeared but the defendants were absent and not represented, and the court entered judgment against them for the amount of plaintiff's claim. Within two days thereafter defendants, by their attorneys, filed a written motion to vacate the judgment, which motion was supported by an affidavit. This, in substance, alleged that the failure to be present on the day of the trial was due to a mistake of a clerk in the office of defendants' attorneys who was confused by the announcement of the cases on the Municipal Court judges' calls which appeared in the "Daily Municipal Court Record," a daily paper or bulletin giving the court calls. The clerk's mistake seems to have been made possible by the fact that some of the

Butcher Folding Crate Co. v. Fish, 195 Ill. App. 243.

judges were suspending their calls on account of the sessions of the State Bar Association, while others were not.

HINER, BUNCH & LATIMER, for plaintiffs in error.

McMAHON & CHENEY, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

JUDGMENT, § 286*—*when refusal of motion to vacate judgment by default reversible error.* Where defendants' attorneys failed to be present on the day the case was set for trial in the Municipal Court of Chicago through a mistake of a clerk in their office who was confused by the announcement of the cases on the Municipal Court judges' calls appearing in a daily bulletin giving such calls, such confusion being made possible by the fact that, at the time, some of the judges were suspending their calls while others were not, it is error to deny a motion to vacate the judgment.

**Butcher Folding Crate Company, Defendant in Error,
v. S. T. Fish, trading as S. T. Fish & Company,
Plaintiff in Error.**

Gen. No. 20,625. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Action by Butcher Folding Crate Company, a corporation, plaintiff, against S. T. Fish, trading as S. T. Fish & Company, defendant, to recover for crates sold and delivered. There was a judgment for plaintiff for \$672.18, to reverse which defendant prosecutes this writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Butcher Folding Crate Co. v. Fish, 195 Ill. App. 243.

The evidence tended to show that in March, 1911, plaintiff's president made a verbal contract with the defendant for about 30,000 crates at seventeen cents each, to be shipped to Asherton, Texas, to be used by onion growers there who were shipping onions to defendant. Defendant testified that his firm was to collect for plaintiff the price of the crates from the growers as they were shipped to defendant, which was denied by plaintiff. Plaintiff proceeded to make shipments and had delivered some 18,000 or more crates when it was advised on account of the market being bad to stop shipments. It thereafter agreed to release the defendant from liability for the balance of crates, about 10,000, contracted for and shipped but not delivered. On June 30th plaintiff's president called at the office of defendant for the purpose of procuring a settlement for all crates that had been shipped, and it was then ascertained that there was a balance due plaintiff of \$821, not taking into account certain crates which had been delivered to one Obets, an onion grower who was marketing his crop through the defendant. The number of these Obets crates was about 4,354. As the result of the conversation at this time a written contract was entered into as follows:

“In consideration of accepting S. T. Fish & Company's check A3214 for Eight Hundred Twenty-one Dollars, it is understood that the balance of the crates, 4354 crates, delivered to Charles Obets at Asherton, Texas, are to be returned to the onion platform at Asherton; and if any shortage, when delivery is made to the platform, from above number, S. T. Fish & Company agree to make good.

(Signed),

S. T. Fish & Company.

Accepted: Butcher Folding Crate Company.”

There was evidence tending to show that on or after the date of this agreement the only crates returned to the platform by Obets, or on his behalf, were 400, which

City of Chicago v. Marshall, 195 Ill. App. 245.

were afterwards sold by Obets and were never received by plaintiff. It was shown that Obets received about 6,500 crates, used for his own crop about 2,400 and made two sales to other growers, one of about 2,666 and the other of 1,600, which were hauled directly from his farm to the premises of the purchasers.

The principal defense was the return of the crates by Obets under the agreement. Defendant also contended that there was no consideration for the agreement.

BENJAMIN C. BACHRACH and **ARTHUR C. BACHRACH**, for plaintiff in error.

ALBERT E. LUCIUS and **EDWARD B. LUCIUS**, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

SALES, § 329*—*when evidence sufficient to support verdict. Evidence in action to recover for purchase price of goods sold and delivered, examined and held to support the verdict.*

City of Chicago, Defendant in Error, v. Emily Marshall, Plaintiff in Error.

Gen. No. 20,642. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. **CHARLES N. GOODNOW**, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Complaint by the City of Chicago against Emily Marshall, defendant, of violating section 2019 of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rothbaum et al. v. Levy, 195 Ill. App. 246.

Municipal Code of Chicago by being the keeper of a disorderly house. There was evidence for complainant of conduct of a woman inmate of the house and defendant admitted three former convictions of keeping a disorderly house. Some of complainant's testimony was denied by defendant. To reverse a judgment of the court fining defendant, she prosecutes this writ of error.

CHARLES HORGAN, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error; JOHN F. POWER, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

DISORDERLY HOUSE, § 2*—*when evidence sufficient to support verdict.* Evidence in a prosecution on the charge of keeping a disorderly house, examined and *held* to support a finding that defendant was guilty.

Albert Rothbaum and Mandel Astrahan, trading as Rothbaum & Astrahan, Plaintiffs in Error, v. Henry Levy, Defendant in Error.

Gen. No. 20,722. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment in this court. Opinion filed November 1, 1915. Rehearing denied November 15, 1915.

Statement of the Case.

Action by Albert Rothbaum and Mandel Astrahan, trading as Rothbaum & Astrahan, plaintiffs, against Henry Levy, defendant, to recover \$200 on the following contract:

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rothbaum et al. v. Levy, 195 Ill. App. 246.

“This agreement, entered between Henry Levy, party of the first part, and Nathan Smelnitzky and Louis Astor, parties of the second part; Witnesseth: Whereas, said parties have assigned a certain judgment in favor of themselves against Annie Perlman for the sum of \$650, of which sum \$150 are due to Levy & Levy for legal fees, and in consideration of the said assignment the said Henry Levy, assignee, hereby undertakes to pay the \$500 to the following persons: Sam Leviton, lumberman, the sum of \$200 or less; Rothbaum, on account of judgment, \$200 or less, and the balance to the North Side Sash and Door Co.

“Witness our hands and seals this 29th day of April, 1913.

Henry Levy,
N. Smalinsky,
Louis Astor.”

To reverse a judgment for plaintiffs, defendant prosecutes this writ of error.

I. B. PERLMAN, for plaintiff in error; M. A. MILKEWITCH, of counsel.

HARRY H. LEVY, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 319*—*when parol evidence inadmissible to vary terms of written contract.* In an action on a written contract, parol evidence tending to show that the contract was not to take effect until one of the parties had paid the other a certain sum of money, is inadmissible.

2. CONTRACTS, § 56*—*when delivery of written agreement not essential to validity.* Where a contract in writing is entered into whereby in consideration of the assignment to the party of the first part of a judgment rendered in favor of the parties of the second part against a third person, the party of the first part agrees to make certain payments to other persons, a delivery of the contract to the parties of the second part is not essential to its validity.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Leviton Lumber Co. v. Levy, 195 Ill. App. 248.

3. EVIDENCE, § 333*—*when evidence as to consideration for contract admissible.* In an action on a contract whereby one party agrees to pay certain sums in consideration of the assignment to him of a judgment in favor of the other party against a third person, evidence that there was no judgment against such person at the time the contract was executed, and that the first party did not collect any money on the judgment, is admissible.

Leviton Lumber Company, Plaintiff in Error, v. Henry Levy, Defendant in Error.

Gen. No. 20,723. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment in this court. Opinion filed November 1, 1915.

Statement of the Case.

Action by Leviton Lumber Company, a corporation, plaintiff, against Henry Levy, defendant. This case grew out of the contract involved in *Rothbaum & Astrahan v. Levy, ante*, p. —, and was consolidated for hearing with the latter case. Judgment of the lower court for defendant was reversed and entered for plaintiff.

I. B. PERLMAN, for plaintiff in error; M. A. MILKEWITCH, of counsel.

HARRY H. LEVY, for defendant in error.

MR. PRESIDING JUSTICE MCSUBELY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hofman v. Chicago League Ball Club, 195 Ill. App. 249.

Arthur Hofman, Appellee, v. Chicago League Ball Club, Appellant.

Gen. No. 20,844. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915. Rehearing denied November 15, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Arthur Hofman, plaintiff, against Chicago League Ball Club, defendant, to recover a balance of salary claimed to be due under a contract of employment. From a judgment for plaintiff for \$2,944.47, defendant appeals.

The evidence shows that plaintiff is a professional baseball player, and that defendant is engaged in giving exhibitions of games of baseball with a club known as the Chicago National League Baseball Club.

On February 23, 1911, plaintiff entered into a written contract with defendant by which it was agreed that plaintiff should play ball for defendant and for no other party, except with defendant's consent, during the series of 1911 and 1912. He was to receive a salary of \$5,000 a year in semimonthly instalments, and an allowance for uniforms, traveling expenses, etc. The baseball season was to begin about April 12th and end about October 12th of each year. The contract also provided that defendant might give plaintiff ten days' written notice to end its obligation under the contract. Plaintiff entered into the service of defendant and played during the season of 1911, and during 1912 up to May 30th.

The parties stipulated the following facts as if proven: That on May 29, 1912, the defendant and the Pittsburg Club made an exchange of players under terms set out in certain telegrams and letters, which contained, in brief, an arrangement for the Chicago

Hofman v. Chicago League Ball Club, 195 Ill. App. 249.

Club to trade the plaintiff and another player to the Pittsburg Club for two of its players, and in a letter dated May 29th to defendant from the Pittsburg Club the latter club says: "The Pittsburg Athletic Company will, of course, assume the contract which the Chicago League Baseball Club now has with Mr. Hofman and Mr. Cole." It was also stipulated "that the Chicago League Ball Club contract with Hofman was duly assigned to and accepted by the Pittsburg Athletic Company, by the defendant, and approved by the president of the National League of Professional Baseball Clubs."

On May 30th defendant wrote to plaintiff, in part, as follows:

"Mr. A. F. Hofman,
West Side Ball Park, City.

Dear Sir:

"This is to inform you that your services have been released to the Pittsburg Club of the National League, to take effect immediately, and Manager Clarke of that Club requests that you report to him at Philadelphia in time for Saturday's game.

"Your contract with the Chicago Club has been assigned over to the Pittsburg Club and will be carried out by that Club."

There was no evidence of any knowledge on the part of plaintiff of anything pertaining to the exchange other than that imparted by this letter. Plaintiff thereupon went to Pittsburg and played with that club. No written contract was made between him and the Pittsburg Club, but it paid him sums of money from time to time to the end of the season, aggregating \$697.47, which was less than the salary he was to receive for the same period under the Chicago Club contract by \$2,944.47. On asking the president of the Pittsburg Club for more money, plaintiff was told to collect from the Chicago Club as his contract was with it and not with the Pittsburg Club.

Aoskad v. Packard Motor Car Co. of Chicago, 195 Ill. App. 251.

Defendant claimed that there was a novation of the contract, the original contract between plaintiff and defendant being extinguished and its place taken by a new contract between plaintiff and the Pittsburg Club.

WILKERSON & CASSELS, for appellant; EDWIN H. CASSELS and KENNETH B. HAWKINS, of counsel.

ROY D. KEEHN, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. NOVATION, § 1*—*what essential requisites.* The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract and the validity of the new one.

2. NOVATION, § 2*—*when evidence insufficient to show assent to new contract.* Evidence in an action on a contract examined and held insufficient to show the assent essential to the cancellation of the old contract and the assent of a new one.

3. APPEAL AND ERROR, § 1466*—*when error harmless.* In an action to recover on a contract, error in reading a portion of plaintiff's statement of claim to the jury and in refusing to strike out portions of the statement are not grounds for reversal where the defense is a novation of the contract and the Appellate Court finds as a matter of law that there was no novation.

Frank A. Aoskad, Appellee, v. Packard Motor Car Company of Chicago, Appellant.

Gen. No. 20,941.

CHATTEL MORTGAGES, § 267*—*when report of sale under power in mortgage insufficient.* A report to the mortgagor of the sale of mortgaged chattels under a power of sale in the mortgage does not sufficiently comply with the requirements of Hurd's Ill. St. 1913, ch. 95, sec. 26 (J. & A. § 7603), where it omits to give the name of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Aoskad v. Packard Motor Car Co. of Chicago, 195 Ill. App. 251.

purchaser or purchasers of the chattels, even though the mortgagor made no inquiry of the mortgagee as to the purchaser's name and was not injured by his lack of knowledge.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

MAYER, MEYER, AUSTRIAN & PLATT, for appellant.

HOWARD W. HAYES, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff had judgment for \$1,333.33 in an action to recover the penalty provided in section 26, ch. 95, Ill. St. 1913 (J. & A. ¶7603). This section provides, in brief, that after sales are made of personal property under any power of sale in a chattel mortgage, "the mortgagee shall make out a statement showing the items of personal property sold, the names of each purchaser and the amount for which each article sold, and also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling said property, and shall deliver the same to the mortgagor or some one of them in person or by mail, and if he fails so to do within ten days after said sale, the owner of said property may sue for and recover one-third of the value of the property so sold, from the mortgagee or person making said sale as assignee of said mortgagee."

It is stipulated that two Packard truck chassis belonging to plaintiff, each subject to a chattel mortgage, were sold under the respective powers of sale by defendant, the mortgagee. Within ten days thereafter, statements of each sale were delivered to plaintiff, the mortgagor, which apparently met with all the requirements of the above statute except that the name of the purchaser or purchasers at the sales was not given in either statement.

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Plaintiff claims that by reason of this omission the statute has not been complied with, and defendant claims there has been a substantial compliance.

We cannot hold there is a substantial compliance with the statute when a distinct and unambiguous requirement is omitted. If the omission of one requisite is not fatal, it could with equal force be said that with two requirements omitted there is still a substantial compliance, and if with two omitted, why not with three or more? Where shall the line be drawn? We see no reason to hold that any one of the statutory requirements may be omitted. Neither does it avail to show either that the mortgagor did not inquire of the mortgagee for the name of the purchaser or was not injured by his lack of knowledge. The statute places upon the mortgagee the duty of supplying this information to the mortgagor, regardless of other sources of information he may have, or resulting harm or benefit to him.

We cannot construe even a penal statute so liberally as to supply something wholly lacking. We might construe an imperfect attempt to state an item of required information so as to give effect to what was intended, but we must have something to start with; we cannot construe something into being from nothing.

The trial court properly refused to hold as propositions of law that the notices furnished by the defendant to the plaintiff were in substantial compliance with the Chattel Mortgage Act (J. & A. ¶ 7603), and also that the defendant did not fail to furnish the information required by law.

The judgment is affirmed.

Affirmed.

Mann v. Blair et al., 195 Ill. App. 254.

Esther Mann, Appellee, v. Henry A. Blair and John M. Roach, Receivers, Appellants.

Gen. No. 21,013. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 1, 1915.

Statement of the Case.

Action by Esther Mann, plaintiff, against Henry A. Blair and John M. Roach, as receivers of Chicago Railways Company, defendants, to recover for injuries alleged to have been received while a passenger on defendants' street car through negligence in its operation. There was a judgment for plaintiff for \$3,000, from which defendants appeal.

The testimony shows that as the car was proceeding along the street there was a burst of flame from the controller, and panic followed, causing injuries to some of the passengers, including plaintiff. The closely contested point concerns the extent of plaintiff's injuries, with special reference to whether the injury caused her to suffer from epilepsy. The evidence on this point was contradictory.

On behalf of the defendants, Dr. Krohn basing his opinion on his experience, testified that plaintiff could not have suffered epilepsy as the result of the accident in question, saying, "Fright does not produce epilepsy." The attorney for plaintiff, after having identified through the witness a book on nervous diseases written by Professor Starr, asked whether Professor Starr did not say in his book that "about one-half of the cases of epilepsy is caused by fright." Questions to the same import were repeated and so framed as to appear to be statements of what was contained in Starr's book. Objections were made and overruled and exceptions taken. At the conclusion of the taking of testimony, plaintiff's attorney exhibited

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the book to the court and jury and stated, in effect, that he proposed to show by Professor Starr's book that it was therein stated that epilepsy may be caused by fright.

ROBERT J. SLATER and FRANK L. KRIETE, for appellants; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

JACOB LEVY, for appellee; JOSIAH BURNHAM, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 125*—*when use of books by counsel to contradict expert improper.* In the cross-examination of a medical witness who bases his opinion upon his own personal observation, the conduct of counsel in asking, after identifying through the witness a scientific book, whether the author of the book did not state contrary conclusions from that of the witness, such questions being so framed as to appear to be statements of what was contained in the book, and in exhibiting the book to the court and jury and stating that he purposed to show by it that such contrary opinion was stated, constitutes reversible error.

2. STREET RAILROADS, § 140*—*when instructions in action against misleading.* In an action against a street railroad company to recover for injuries alleged to have been caused plaintiff while a passenger in defendant's car, an instruction that the jury in weighing the evidence shall take into consideration the fact that certain witnesses were in defendant's employ is misleading.

The People of the State of Illinois ex rel. Tony Blasi and Hector Durante, Appellees, v. James H. Burdett, Appellant.

Gen. No. 20,296.

1. PROHIBITION, § 1*—*when writ will lie.* To warrant the issue of a writ of prohibition against official action, the action sought to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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be restrained must be judicial in character and must be one not in the jurisdiction of the tribunal or officer in question.

2. CIVIL SERVICE, § 10*—*when hearing of charges not judicial function.* The hearing of charges against officers in classified civil service under the authority granted by section 12 of the State Civil Service Act (J. & A. ¶ 10638) is not the exercise of a judicial function.

3. PROHIBITION, § 2*—*when issue against member of State Civil Service Commission unauthorized.* The issue of a writ of prohibition prohibiting a member of the State Civil Service Commission from hearing charges against the relators, officers in the classified civil service, in the manner provided by section 12 of the State Civil Service Act (J. & A. ¶ 10638) is unauthorized.

4. PROHIBITION, § 2*—*when writ will not lie.* A writ of prohibition does not lie to bring before the higher tribunal matters which may properly be brought before it by writ of error or certiorari, nor to correct errors of inferior tribunals whereof they have jurisdiction.

5. CIVIL SERVICE, § 26*—*when proceedings of State Civil Service Commission reviewable by certiorari.* A writ of certiorari will lie to review the proceedings of the State Civil Service Commission, held under section 12 of the State Civil Service Act (J. & A. ¶ 10638), discharging officers in the classified civil service.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1914. Reversed. Opinion filed November 1, 1915.

WILLIAM B. MOULTON and JOHN J. POULTON, for appellant.

ADOLPH MARKS, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

The relators, employees of the State Civil Service Commission of Illinois, filed in the Circuit Court their petition praying that a writ of prohibition issue prohibiting James H. Burdett, a member of such commission and the president thereof, from taking any part in the hearing of the charges filed by Richard J. Knight against relators for the purpose of securing their discharge and removal from the classified civil service of the State. The defendant, appellant here,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

demurred to the petition. The demurrer was overruled, and he electing to abide, the court gave judgment for the plaintiff and ordered that defendant be prohibited from enforcing any order, finding or decision and from entering on any hearing pertaining to any charges filed against the relators, and from counseling or advising with the other Civil Service Commissioners of the State pertaining to the charges against the relators. From this order the present appeal is prosecuted.

Section 12 of the State Civil Service Act (J. & A. ¶10638) provides that charges may be investigated by or before said Civil Service Commission or some officer or board appointed by said commission to conduct such investigation, and that "the finding and decision of such commission or such investigating officer or board, when approved by said commission, shall be certified to the appointing officer and shall be forthwith enforced by such officer." The petition alleges that defendant Burdett intended to hear said charges, that he intended to disregard the rules of evidence, was prejudiced against relators, and that they could not have a fair and impartial trial before him, and that they were not guilty of said charges. There is in the petition no allegation that Burdett could discharge the relators nor that they were without other remedy or right of review of the matter complained of, or that Burdett was acting in a judicial capacity.

The functions whose exercise may be restrained by the writ of prohibition are judicial. Section 12 of the City Civil Service Act, Hurd's St. 1913, p. 401 (J. & A. ¶1811) is identical with section 12 of the State Civil Service Act, p. 491 (J. & A. ¶10636).

In *People ex rel. Miller v. City of Chicago*, 234 Ill. 416, it was held that section 12 of the City Civil Service Act providing that charges against officers in classified civil service shall be investigated "by the

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Civil Service Commission or before some officer or board appointed by said commission," does not vest judicial power in the commission nor amount to a delegation of judicial power by the commission to the officer or board appointed, and it was said: "The removal of an officer is not the exercise of a judicial power, as there is no such thing as title or property in a public office. *Donahue v. County of Will*, 100 Ill. 94; *Stern v. People*, 102 id. 540." Not only must the actions sought to be restrained be the actions of a tribunal acting in a judicial capacity, but such actions or threatened actions sought to be restrained must be transactions not within the jurisdiction of the tribunal or officer in question. *People v. Cook County Circuit Court*, 173 Ill. 272. "An act is none the less ministerial because the person performing it may have to satisfy himself that a state of facts exists under which it is his right and duty to perform the act." *Flournoy v. City of Jeffersonville*, 17 Ind. 169.

The acts which Burdett was restrained from performing were ministerial and administrative, not judicial, and for that reason the writ of prohibition would not run against him. "A writ of prohibition can only be issued to restrain the exercise of judicial functions. * * * It cannot be made to serve the purpose of a writ of error or certiorari, to correct mistakes of an inferior court or tribunal in deciding any question of law or fact within its jurisdiction." *Smith v. Whitney*, 116 U. S. 167.

"The appropriate function of the remedy (by prohibition) is to restrain the exercise of unauthorized judicial or *quasi* judicial power, which is regarded as a contempt of the State or sovereign, and which may result in injury to the State or to its citizens. Three conditions are necessary to warrant the granting of the relief: First, that the court, officer or person against whom it is sought is about to exercise judicial or *quasi* judicial power; second, that the exercise of

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such power is unauthorized by law; third, that it will result in injury for which no other adequate remedy exists. And the remedy may be invoked against any body of persons or officers assuming to exercise judicial or *quasi* judicial powers, although not strictly or technically a court." *High on Extraordinary Remedies*, sec. 764a. A writ of prohibition does not lie to bring before the higher tribunal matters which may properly be brought before it by writ of error or certiorari, and cannot be used to correct errors of inferior tribunals whereof they have jurisdiction. *People v. Cook County Circuit Court*, 173 Ill. 272. The petitioners had the right of review by writ of certiorari, resorted to in this State in these proceedings. *People v. Lindblom*, 182 Ill. 241; *Joyce v. City of Chicago*, 216 Ill. 466; *Powell v. Bullis*, 221 Ill. 380.

In view of the authorities cited it is, we think, a fatal objection to the relators' right to the writ, that they had, in the event they were discharged, the right of review of the proceedings of the State Civil Service Commission by certiorari.

In our opinion, the facts stated in the petition are insufficient to authorize the issuing of the writ of prohibition, and the court erred in overruling defendant's demurrer to the petition and in ordering that the writ issue.

The judgment of the Circuit Court is reversed.

Reversed.

F. J. Haggarty Company, Defendant in Error, v. M. G. Conley, Plaintiff in Error.

Gen. No. 20,310. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in this court at the October term,

Haggarty Co. v. Conley, 195 Ill. App. 259.

1914. Affirmed. Opinion filed November 1, 1915. Rehearing denied November 15, 1915.

Statement of the Case.

Action by F. J. Haggarty Company, a corporation, plaintiff, against M. G. Conley, defendant, for \$75 alleged to have been overpaid by plaintiff to defendant by mistake. Defendant claimed a set-off of \$911.50. There was a judgment for plaintiff, to reverse which defendant prosecutes this writ of error.

The evidence showed that Frank J. Haggarty for some years prior to January 31, 1911, was a partner with his father in the teaming business under the name of M. C. Haggarty & Son, and on that day the firm was dissolved and M. C. Haggarty took all the property and assets of the firm. From January 31 to April 13, 1911, Frank J. Haggarty did some teaming business on brokerage, but had no teams, wagons, trucks or other assets of his own. April 14th a corporation was organized under the name of F. J. Haggarty Company, with an authorized capital of \$5,000. F. J. Haggarty subscribed for \$2,500 of the capital stock, W. E. Hall for \$2,400, and John Kercher for \$100. Frank J. Haggarty's wife paid for the \$2,500 stock subscribed for by him, and \$2,400 of the stock was transferred to her. Hall and Kercher paid for the stock subscribed by them respectively. Neither Mrs. Haggarty, Hall nor Kercher were interested in or in any way connected with the teaming business carried on by Frank J. Haggarty prior to the organization of the corporation.

Points relied upon for reversal were: First. Where an organization or association of persons take a name which imports a corporate existence and do business and contract under that name, they will be estopped to deny that they are a corporation; second, that where a corporation is a mere continuation of the same business previously transacted by the same parties, it must

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be presumed to be bound by the obligations which such business is liable for. The contention of defendant in error is that the facts disclosed do not bring the case within the rules of law so stated.

COBURN & BENTLEY, for plaintiff in error.

FRANCIS E. CROARKIN, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 57*—*when evidence insufficient to estop denial of corporate existence.* Evidence examined in an action by a corporation to recover an amount alleged to have been paid by mistake on a debt incurred by another before its incorporation, and *held* insufficient to show that there was an organization or association of persons doing business under the corporate name before plaintiff received its charter.

2. CORPORATIONS, § 472*—*when evidence insufficient to show corporation a continuation of another business.* Evidence in action by corporation examined and *held* insufficient to show that the corporation was a mere continuation of the same business previously conducted by the same parties.

**Simon T. Sutton, Administrator, Plaintiff in Error, v.
City of Chicago, Defendant in Error.**

Gen. No. 20,422.

1. NEGLIGENCE, § 112*—*when negligence of driver of automobile not imputed to guest.* The negligence of the driver of an automobile cannot be imputed to one riding therein as guest of the driver.

2. NEGLIGENCE, § 191*—*when a question of fact for the jury.* In an action against a municipal corporation to recover for the death of one drowned by an automobile in which he was riding running into an open drawbridge maintained by a municipality, where the evidence shows that the deceased was one of a party of eight in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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automobile who, including the chauffeur, had been drinking for about six hours, the question whether deceased was negligent in riding in the machine, under the circumstances, was one of fact for the jury.

3. APPEAL AND ERROR, § 1410*—*when evidence sufficient to warrant finding of drunkenness.* In an action to recover for the death of a person drowned by an automobile running into an open drawbridge, evidence examined and *held* sufficient to support a finding that deceased and other members of the party were intoxicated.

4. NEGLIGENCE, § 188*—*when evidence sufficient to show injury not result of an accident.* In an action to recover for the death of one drowned by an automobile running into an open drawbridge, where the evidence shows that the chauffeur was so drunk that he did not know in what direction he was going, the occurrence cannot be considered an accident but rather a probable result of the conditions.

5. NEGLIGENCE, § 208*—*when instructions as to contributory negligence proper.* In an action to recover for the death of one drowned by the running into an open drawbridge of an automobile driven by a drunken chauffeur, it is not error to instruct that there would be no recovery unless the jury find that the deceased himself was guilty of no negligence contributing to the injury, and exercised ordinary care to avoid the occurrence alleged.

6. APPEAL AND ERROR, § 1523*—*when giving of instructions harmless error.* The giving of an improper instruction is not ground for reversal where such instruction is not calculated to mislead the jury.

7. APPEAL AND ERROR, § 1514*—*when reference in argument of counsel to contradictory statements not ground for reversal.* Where defendant introduces evidence of previous statements by witness for plaintiff contradicting his evidence on the stand, reference by counsel for defendant in the course of his argument to the evidence of such contradictory statements is not ground for reversal.

Error to the Superior Court of Cook county; the Hon. JOSEPH E. FITCH, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915. Rehearing denied November 15, 1915.

JOHN C. KING & JAMES D. POWER, for plaintiff in error.

M. L. PIOTROWSKI, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is a writ of error to reverse a judgment of *nil capiat* rendered on a verdict of not guilty in an action for wrongful death. Plaintiff's intestate was riding in an automobile, at the invitation of the driver, which ran into an open drawbridge at Torrence avenue and the Calumet River and he was drowned. The negligence alleged was that the defendant negligently permitted the bridge to be open.

We think the evidence proves the negligence alleged, and the questions presented relate to alleged errors in procedure and to the question whether the jury might from the evidence properly find that the deceased was guilty of contributory negligence.

By invitation of Morschbacher, three men and four women set out on a "joy ride" in the machine driven by him about four o'clock in the morning. The women were inmates of a house of prostitution at 2106 Armour avenue, and the men were chauffeurs. They had all been drinking before starting and stopped at several places on their way to South Chicago and drank more. They stopped at two sporting houses in South Chicago, had drinks and danced and left the last one, "The Black Diamond," between five and six o'clock, intending to go back to the place from which they started, which is ten miles, or further, north of "The Black Diamond." From the evidence the jury might properly find that they were all intoxicated when they left "The Black Diamond." Morschbacher sat on the driver's seat with one of the women by his side. A man and a woman sat on the swivel seats behind them. On the rear seat Kingdom sat with May Kelly on his lap and plaintiff's intestate with Margaret Atkins on his lap. Morschbacher testified that he did not know the direction he was traveling. When going in a westerly direction he reached Torrence avenue, and instead of turning to the right, as he must to go north, the direction which he wished to go, turned to the left and went south, away from 2106 Armour avenue. This

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brought him to the Torrence avenue bridge. The street at the bridge is seven feet higher than it is two hundred feet north. Morschbacher saw that there was a bridge ahead when he was two hundred feet from it, but he drove on up the grade until within twenty feet of the bridge, when, he testified, he first saw that it was open; that he then made every effort in his power to stop the machine, but was unable to do so and it went into the river. There was evidence that the machine, going at the rate of twelve miles an hour, as he testified it was, on the grade in question, could be stopped within less than twenty feet; and we think that the question whether he was guilty of negligence is one of fact on which the verdict must be held conclusive.

The negligence of Morschbacher cannot be imputed to the deceased; but the question presented here is whether the deceased was negligent in riding in the machine driven by Morschbacher under the facts and circumstances disclosed by the evidence. We think that this also was a question of fact on which the verdict of the jury must be held conclusive.

Here was a party of eight, who had been drinking since midnight, and, as the jury might properly find, were all drunk, so that they did not even know that they were going away from home when they wanted to go home, indulging in a "joy ride." That the machine should run into an open draw was not perhaps to be anticipated, but that a ride in an automobile under such circumstances with such a chauffeur was attended with danger to the passengers, was obvious. The occurrence was not an accident, using the word as meaning an event without apparent cause, but rather a probable result of the causes and conditions shown by the evidence.

Plaintiff in error contends that the court erred in instructing the jury that the plaintiff could not recover unless they found: "3rd. That the deceased himself was guilty of no negligence contributing to the injury

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and exercised ordinary care to avoid the occurrence alleged.” With this contention we cannot agree.

Instructions 4, 5 and 6 state the degree of care necessary to be exercised in the maintenance of the bridge. As no complaint was made as to the condition of the bridge, but only as to its operation, these instructions should not have been given; but we do not think that they were calculated to mislead the jury, or that for the giving of them the judgment should be reversed.

It is further contended that the court erred in permitting counsel for the defendant to argue to the jury the question whether the speedometer was working. Morschbacher testified that it was. Defendant introduced evidence of previous statements by Morschbacher that it was out of order and was not working. While evidence of such previous statements do not tend to prove the fact, it was admissible for the purpose of impeaching the witness only, and counsel had the right to refer to the evidence of contradictory statements of Morschbacher, and we see nothing in the argument made that warrants or requires the reversal of the judgment.

We think the record is free from reversible error, and the judgment is affirmed.

Affirmed.

Friedrich Heinz, Defendant in Error, v. Baldwin County Colonization Company, Plaintiff in Error.

Gen. No. 20,490. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Action by Friedrich Heinz, plaintiff, against Baldwin County Colonization Company, a corporation, defend-

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ant, to recover \$251 paid by plaintiff to defendant on a contract entered into April 1, 1909, for the purchase of certain real estate of defendant for \$1,000, the contract having been entered into while plaintiff was a minor. The court gave plaintiff judgment for the amount claimed, and to reverse such judgment this writ of error is prosecuted.

The trial began February 10, 1914. Plaintiff was called as a witness in his own behalf, was examined and cross-examined, and the further hearing of the cause was then postponed to February 28th. It was further postponed to April 3rd. April 1st defendant's attorney gave notice to plaintiff's attorney that he desired to further cross-examine plaintiff, and, if not produced, he would move to strike out his testimony. He was not produced. Defendant's motion to strike out his testimony was denied.

Plaintiff became of age December 12, 1909. In April, 1910, and again in October, 1912, he informed the defendant that he did not want to keep the land and demanded his money back. The land was not conveyed to the plaintiff, but a contract of purchase and sale was entered into. Defendant offered to repay him \$75 of the \$251 that he paid, but he declined the offer.

SABATH, STAFFORD & SABATH, for plaintiff in error.

JOHN M. BRYANT, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1377*—*when refusal to permit further cross-examination of plaintiff not ground for reversal.* The refusal of the trial court, after a plaintiff called as a witness in his own behalf had been examined and cross-examined and after two post-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ponements of the hearing, to permit him to be recalled for further cross-examination, *held* not an abuse of the trial court's discretion.

2. INFANTS, § 23*—*when disaffirmance of contract in reasonable time.* Evidence examined in action to recover purchase price paid by infant on purchase price of land, and *held* to show that contract had been disaffirmed in reasonable time after plaintiff had arrived at age.

**United States Casualty Company, Plaintiff in Error, v.
Crown Novelty Company, Defendant in Error.**

Gen. No. 20,595.

1. CONTRACTS, § 187*—*when construction by parties to be followed.* When parties to an ambiguous contract by their own acts place a construction upon it, such construction is the best evidence of what the contract was supposed to mean.

2. INSURANCE, § 155*—*when evidence insufficient to support verdict.* Evidence in an action to recover unpaid premiums on an insurance policy, examined and *held* insufficient to support the verdict.

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed November 1, 1915.

MOSES, ROSENTHAL & KENNEDY, for plaintiff in error;
SIGMUND W. DAVID, of counsel.

J. F. DAMMANN, JR., for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This is a suit for unpaid premiums on an insurance policy and an indorsement, covering the insurance of employees. April 23, 1912, the defendant, defendant in error here, insured itself with the plaintiff corporation, plaintiff in error here, against its common-law liability for accident to its employees. May 1, 1912, defendant further insured itself by an indorsement, which was attached to and made a part of the original policy, which covered only the liability of defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to its employees arising by virtue of the Workingmen's Compensation Law of 1911 (J. & A. ¶5449). The policy and indorsement each provide that the amount of premium is based on an estimated pay roll, and that the premium shall finally be determined by the amount of the actual pay roll during the periods covered by the policy and the indorsement. At the time the policy and indorsement were issued the premiums were tentatively fixed on an estimated pay roll of \$40,000. The premium rate per \$100 as stated in the original policy was 36 cents. The premium rate as stated in the indorsement per \$100 was \$1.89. At the end of the year it was found that the actual pay roll during the year was \$58,365.60.

Suit was brought by the plaintiff to recover premiums for the amount of the excess of the pay roll over \$40,000. It is conceded that plaintiff is entitled to premiums based upon the pay roll of \$58,365.60, but the contention of defendant in error is that the premium rate for both the original policy and the indorsement is \$1.89, and the contention of plaintiff in error is that the premium rate is 36 cents for the original policy and \$1.89 for the indorsement, or a total rate of \$2.25 on the pay roll. The court sustained the contention of the defendant and gave judgment for \$226.65, and the plaintiff in error asks that such judgment be reversed and judgment entered here in favor of the plaintiff for \$436.75, the amount of premiums unpaid, if plaintiff is entitled to recover premiums at the rate of \$2.25 on the pay roll.

The indorsement is called "Combination Coverage" and provides that in consideration of the premium for which this policy is issued, this policy is hereby extended to cover the liability of the assured under the Compensation Act of 1911 (J. & A. ¶5449), and further provides as follows:

"The premium for this Endorsement is based upon the entire compensation for services, of which an esti-

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mate is hereinafter given. The premium rate or rates for this Endorsement are those hereinafter set forth, and apply to each one Hundred Dollars (\$100.00) of the entire compensation for services during the period of this Endorsement. The earned premium for this Endorsement shall be determined in the manner set forth in the policy. * * * Premium rate per \$100 of Compensation for services, \$1.89.”

The original policy in terms provides that it does not cover any obligation assumed by or imposed upon the insured by any compensation agreement, plan or law.

Defendant introduced in evidence a book called “Manual of Liability for Workingmen’s Compensation Insurance,” and gave evidence tending to show that “Combination Coverage” meant the covering of all employees against the Illinois Act or any common-law liability prior to the Compensation Act.

We see no ground for the contention that the policy and indorsement are ambiguous or uncertain. Their terms state that the rate for one is 36 cents, and for the other one \$1.89 per \$100 of the pay roll, a total rate of \$2.25. But if it be conceded that the policy and indorsement are ambiguous, the parties have already construed the contract, and when parties to an ambiguous contract by their own acts place a construction upon it, that construction is the best evidence of what a contract supposedly ambiguous was actually intended to mean. The plaintiff rendered to defendant a bill for the amount of premium due upon the original policy upon an estimated pay roll of \$40,000 at 36 cents per \$100, and another bill at the rate of \$1.89 on the same estimated pay roll for the indorsement, and defendant without objection paid both bills.

The judgment of the Municipal Court is reversed and judgment will be entered here in favor of the plaintiff and against the defendant for \$436.75, and the costs in this court.

Reversed and judgment here.

Barber v. Travelers' Ins. Co., 195 Ill. App. 270.

Bert S. Barber, Plaintiff in Error, v. Travelers' Insurance Company, Defendant in Error.

Gen. No. 20,738. (Not to be reported in full.)

Marion Belle Barber, Plaintiff in Error, v. Travelers' Insurance Company, Defendant in Error.

Gen. No. 20,739. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY OLSON, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Action by Bert S. Barber, plaintiff, against Travelers' Insurance Company, defendant, and by Marion Belle Barber, plaintiff, against Travelers' Insurance Company, defendant, each to recover on an accident policy issued by defendant to Lyman W. Barber, the beneficiary named in one policy being Bert S. Barber and in the other Marion Belle Barber. There was judgment for defendant in both actions, to reverse which plaintiffs prosecute these writs of error.

A former trial of the same cases on the same evidence, with the exception of the testimony of Irma Palmer and Mildred Shippey, which testimony was first introduced on the present trial by defendant, resulted in judgment for the respective plaintiffs, which was reversed by this court and the causes remanded. *Barber v. Travelers' Ins. Co.*, 165 Ill. App. 239. In the opinion then filed the pleadings and questions involved were fully stated. The policy provided: "*That this insurance shall not cover * * * death * * * resulting wholly or partly, directly or indirectly, from intoxication or while intoxicated.*" The defense on both trials was practically that the assured at the time he came to his death was intoxicated. He left his office about six p. m. of January 4, 1908,

went to a saloon and remained three-quarters of an hour, had there one or two drinks of whisky, then went to supper and after supper had more whisky and also drank beer; about nine o'clock he went to another saloon and then to the "Savoy," where he remained an hour or longer, and drank beer; then about eleven o'clock he went to a house of ill-fame, where he had beer; a little later he went to another house of the same class in the same district, and there remained two hours or longer and drank beer, he went up stairs with Mildred Shippey, an inmate, and, according to her testimony and the testimony of two other inmates of the house, was then intoxicated, vomited and had to be helped up and down stairs. About 1:30 a. m. he went in a cab to a saloon nearby, and then to another house of ill-fame, on leaving which he took a girl into the cab and took her three blocks south of the saloon from which they started and in the direction of the assured's home. Thereafter the assured rode in the cab to the Old Colony Building, nearly two miles north of the place where the girl left the cab. When he reached there he dismissed the cabman, walked up stairs to the elevated railway station, and took a south-bound elevated train at 3:30 a. m. His dead body was found the next morning under the elevated railway station at the Twenty-sixth street station. The evidence showed that he fell from the car on which he was riding at that place and was thereby killed.

The defendant called five physicians and propounded to each the same hypothetical question, stating quite fully the appearance, history and actions of the assured from six p. m. of January 4th until half past three o'clock the next morning, and included the assumption that he staggered, was unable to talk coherently, spoke only a few words and those merely in monosyllables. The question asked was: "Assuming the facts stated in the question, have you an opinion as to whether that man was or was not intoxicated about

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4 a. m. the next morning?" Over the objection of plaintiff the question was permitted to be answered, and the answer by each physician was, in substance, that he had an opinion that the man was intoxicated and that the intoxication would probably continue three or four hours from four o'clock. One of the contentions of the defendant is that the court erred in permitting the hypothetical question to be answered.

WORTH E. CAYLOR, for plaintiffs in error.

FRANK M. COX and R. J. FELLINGHAM, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1507*—*when form of hypothetical question not ground for reversal.* Form of hypothetical question to expert in action on accident insurance policy examined and held not ground for reversal.

2. INSURANCE, § 667*—*when evidence sufficient to support finding that insured died while intoxicated.* Evidence in action on accident insurance policy examined and held to support finding that insured came to his death while intoxicated.

The People of the State of Illinois, Defendant in Error, v. Maclay Hoyne, Plaintiff in Error.

Gen. No. 20,759.

1. APPEAL AND ERROR, § 784*—*when matters of not formally given in evidence may be incorporated in bill of exceptions.* Semble that matters which transpire in the presence of the court, rules of court and generally those matters of which the court takes judicial notice, may be incorporated in the bill of exceptions, even though not formally given in evidence.

2. APPEAL AND ERROR, § 784*—*what matters cannot be incorporated in bill of exceptions by order of court.* Statements of acts and trans-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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actions not occurring in the presence of the court, and writings not presented to the court while in session and not shown by the evidence, cannot be incorporated in the bill of exceptions by order of the court.

3. CONTEMPT, § 30*—*when criticisms of past conduct of judge not criminal contempt.* Criticisms of the conduct of a judge of the Superior Court when sitting as a judge of the Criminal Court of Cook county, relative to his acts in summoning and continuing a special grand jury and appointing a Special State's Attorney, do not constitute criminal contempt of such judge when made after the judge was no longer sitting as a judge of the Criminal Court, and when none of the indictments returned by such special jury were pending before him and without reference to a trial on any of such indictments.

Error to the Criminal Court of Cook county; the Hon. WILLIAM FENIMORE COOPER, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 1, 1915.

EVERETT JENNINGS and S. S. GREGORY, for plaintiff in error.

JOHN E. NORTHUP, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment of the Criminal Court of Cook county, whereby respondent Hoyne, State's Attorney of Cook county, plaintiff in error here, was adjudged guilty of a contempt of that court, fined five hundred dollars and committed to the county jail for ten days therefor.

By order of Judge Cooper, a judge of the Superior Court, then sitting in the Criminal Court, entered May 29, 1913, a special grand jury was called to inquire into the matters pertaining to the choice of a State's Attorney at the election of November 5, 1912, and John E. Northup was appointed Special State's Attorney.

May 28, 1914, respondent made a speech before a certain club in Chicago. The information filed by the Special State's Attorney July 9, 1914, alleged that said special grand jury had been continued from time to time up to the time of the filing of the information and

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still had certain duties to discharge in relation to the things and matters it was impaneled to consider; that it had returned indictments against certain persons, charging them with the commission of crimes in connection with said election, and that a number of said indictments were still pending and undisposed of; that in said speech respondent, "wrongfully, unlawfully, maliciously and contemptuously, for the purpose and with the intent of bringing said court in which the proceedings aforesaid were had, and Judge Cooper, who was the judge presiding over said court, into disrepute and ridicule, and to cause the people to have a feeling of contempt of said court and said judge, and for the purpose of causing it to be believed that said court and said judge were corrupt and influenced by corrupt motives in and about said matters, and for the purpose of impairing the reputation of said court and of said judge for integrity, honesty and efficiency in the administration of public justice, and for the purpose of thwarting the due administration of justice in said court as to said matters, and with the intent wilfully and contemptuously to oppose the proceedings and hinder the due administration of justice in said court concerning the matters then and there pending in said court, as aforesaid, and for the purpose of interfering with the prosecution and trial of defendants on the indictments pending as aforesaid, and to influence the verdicts of jurors before whom said prosecutions would come in the due administration of justice," did make certain statements in the information set forth. The information further alleged that respondent said that Judge Cooper was prejudiced against him and that he gave reasons why he was prejudiced; that the application to Judge Cooper for impaneling a special grand jury and the appointment of a Special State's Attorney was made in bad faith and was a plot to injure respondent politically; that said grand jury had no further work to do, but had been continued

from month to month for political purposes; that respondent further said that Judge Kersten, thirty minutes before the order aforesaid was entered by Judge Cooper, had entered a similar order, and put the question: Why did Judge Cooper enter the order? The information also alleged that in a newspaper report of said speech it was stated that respondent said that Judge Cooper was a "crook"; that Judge Cooper sent a letter of inquiry to respondent May 29, 1914, asking him if he made such an utterance as reported, and in answer to such letter respondent sent Judge Cooper a letter, which is set out in full in the information. In one of the interrogatories respondent was asked if he received a copy of Judge Cooper's letter and if he made the reply thereto set out in the information, and in answer thereto said that he did receive the letter and made the answer set out in the information, and stated that the matter and statements in the letter are true; that it contained, in substance, a correct report of his speech and of what he said on that occasion, and denied that he made any other or different statement in regard to Judge Cooper on that occasion than those in the letter contained, and averred that the statements he then made in respect to matters of fact were true. It is not charged that the statement alleged to have been made by respondent that Judge Cooper was crazy was made with any evil intent, and it may be disregarded, as may the statement that Judge Cooper was a "crook," which respondent denied that he made.

Respondent was ruled to answer the interrogatories and moved to discharge the rule on the ground of the insufficiency of the information in point of law. The motion was denied and a rule entered requiring informant to file interrogatories to be answered by the respondent, and the respondent was ruled to answer. Interrogatories were filed, and the respondent, having filed sworn answers thereto, moved to discharge the rule and dismiss the proceedings upon his sworn

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answers. This motion was overruled, defendant excepted, and afterwards the judgment which it is sought to reverse was entered. At the time the judgment was entered Judge Cooper filed a long opinion, in which he stated many facts not in the record, and directed that his opinion and a letter from respondent to the then chief justice of the Superior Court dated February 17, 1913, which had not been offered in evidence and had not appeared in the record in any way, be made a part of the record.

The question presented is not as to what matters may be brought into a bill of exceptions. No doubt what transpires in the presence of the court, rules of court and generally all matters of which the court takes judicial knowledge, need not be formally given in evidence, but may go into the bill of exceptions. But statements of acts and transactions not occurring in the presence of the court, or writings not presented to the court while in session and not shown by the evidence, cannot be brought into a bill of exceptions nor can they be made a part of the record by the order of the court. In deciding this case we can only consider the information, supporting affidavits, interrogatories and sworn answers thereto. It appears from the record that at the time the speech in question was made, Judge Cooper was not sitting in the Criminal Court of Cook county, but was sitting in the Superior Court of Cook county, of which he is a judge. Rule 13 of the Criminal Court provides that the chief justice shall exercise the general administrative powers of the court, have charge of the calls of the docket, assignment of cases to the several branches and preparing of trial calendars or lists of cases. It is true that Judge Cooper was, under the provisions of the constitution, *ex officio* a judge of the Criminal Court, but so were all of the judges of the Circuit and Superior Courts, and any one of such judges might have been assigned to the Criminal Court and the indictments returned by

the special grand jury placed on his trial calendar for trial. We think that the respondent might properly consider Judge Cooper's connection with the calling of a special grand jury and the appointment of a Special State's Attorney as a matter then concluded and at an end, and his remarks, so far as they could be considered a criticism of Judge Cooper, a criticism of him in respect of conduct then past, in a matter then concluded.

In *Storey v. People*, 79 Ill. 45, it was held that it is not admissible, under our constitution that a publication, however libelous, not directly calculated to hinder, obstruct or delay courts in the exercise of their proper functions, shall be treated and punished summarily as a contempt of court; that the utterance of a slander or the publication of a libel on a judge in relation to an act done by him in his official capacity, but which had no tendency directly to impede, embarrass or obstruct the courts in the exercise of their proper functions, cannot be summarily punished as a contempt of court. There is in the information no allegation that the utterances therein charged as a contempt of court were calculated to prevent the obtaining of a competent petit jury to try any of the defendants against whom indictments had been returned by the special grand jury, or that the judge, whoever he may be, whose duty it will be to preside during such trials will in any wise be affected thereby in the discharge of his duty.

The speech of the respondent, so far as it related to Judge Cooper, consisted entirely of criticisms of his past conduct while sitting in the Criminal Court of Cook county. To the argument that criticism of Judge Cooper might tend to affect unfavorably the cause of the State in any of the indictments returned by the special grand jury which might be brought for trial before him, the answer is, that in the *Storey* case, *supra*, indictments had been returned against Storey which

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were still pending when he grossly libeled and abused the grand jury which had returned the indictments. In this case it appears from the record that no one of the indictments was pending before Judge Cooper, and nothing respondent said related in any way to a trial on any one of such indictments. The question is not whether the respondent slandered Judge Cooper, but whether a criminal contempt of court was committed by him. Our conclusion, after such careful consideration of the case as its importance demands, is that the respondent was not guilty of criminal contempt, and the judgment will therefore be reversed.

Reversed.

George M. Stevens et al., Appellees, v. Mary K. Plummer, Individually and as Administratrix, Appellant.

Gen. No. 20,910.

1. MORTGAGES, § 260*—*when payment not presumed.* In the absence of proof to the contrary, it is presumed that a mortgage is a valid and subsisting lien.

2. JUDGMENT, § 633*—*when payment not presumed.* In the absence of proof to the contrary, it is presumed that a judgment is a valid and subsisting lien.

3. PARTITION, § 129*—*when judgment creditor of party to suit has no title to lands.* In a suit to partition property, the holder of a judgment against one of the parties in interest has no right, title or estate in the lands.

4. PARTITION, § 73*—*when payment of claims against property to be provided for in decree.* It is not necessary that the decree for partition provide that claims and legal obligations against the estate sought to be partitioned shall be borne by the shares set off to the several owners or, in case of a sale of the land, shall be paid from the funds, but such provision may be made by the confirmatory decree.

5. PARTITION, § 73*—*when decree of sale should state amount due under mortgage lien.* Where, on partition, land is sold subject to the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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lien of an existing mortgage, the decree of sale should state the amount due, but if the land is sold free and clear of an existing mortgage, it is not necessary that the court ascertain the amount of the incumbrance before the decree of sale.

6. PARTITION, § 73*—*what procedure proper on sale where mortgagee fails to prove amount due.* Where the existence of a mortgage is alleged in a bill for partition and the mortgagee fails to appear and produce at the hearing proof of the amount due on the mortgage, if a sale is necessary, the court should decree a sale of the premises free and clear of the mortgage lien and should direct the proceeds to be brought into court, when the court may enter a rule that the money be paid within a certain time, unless the mortgagee should, before that time, make proof of the mortgage and the amount due thereon.

7. PARTITION, § 69*—*when proof of amount due on incumbrance properly ordered.* In a partition proceeding, where the bill is taken as confessed, if the court has reason to believe, or is apprehensive that injustice is likely to result from ordering a distribution of the proceeds of the partition sale without proof being made of the amount due on a mortgage on the property, it should require proof to be made.

8. JUDGMENT, § 296—*when motion to vacate decree of distribution of proceeds of partition sale in time.* A motion to vacate the decree of distribution of the proceeds of a partition sale is made in time when made two days after the entering of the decree and at the same term.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. The bill in this case was filed for the partition of certain real estate of which Martha E. Trundle died seized. She placed on said real estate in her lifetime two trust deeds in the nature of mortgages, one to Edwin G. Foreman, trustee, to secure her note for \$4,000, the other to George N. Neise, trustee, to secure her note for \$2,100, and devised the property subject to said two trust deeds as follows: An estate in an undivided one-half for the life of William H. Trundle, to George M. Stevens, trustee,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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with the remainder to said William H. Trundle, and the other undivided one-half to William T. J. Plummer. William T. J. Plummer died intestate without issue, and his widow, Mary K. Plummer, appellant here, became entitled to an undivided one-quarter interest in said real estate, and certain collateral heirs of William T. J. Plummer to one-quarter, subject to the dower interest therein of Mary K. Plummer.

The bill set out the facts above stated, alleged that the trust deeds were in force, and the place of residence of the owners of the notes thereby secured unknown; that E. M. Barnard claimed to have some interest in the premises by virtue of a judgment recovered October 10, 1910, against William T. J. Plummer, on which execution had been issued and returned unsatisfied, which judgment the bill alleged was then unsatisfied of record. All parties in interest, including the unknown holders of the notes secured by said two trust deeds, and Barnard, were made defendants. Barnard entered his appearance, but did not answer or demur, and his default was entered and the bill taken as confessed against him November 7, 1912. Mary K. Plummer answered the bill, admitted the execution of the Neise trust deed and the recovery of the judgment by Barnard against William T. J. Plummer, and alleged that William T. J. Plummer was at one time the owner of the note secured by the Neise trust deed, and that if it be true that Barnard was then the owner of the note secured by said trust deed, that the same was delivered to him by William T. J. Plummer as collateral security for his note for \$2,125, on which the Barnard judgment was rendered, and averring that Barnard was not entitled to enforce more than one of said liens. There was an order of reference to a master, whose report stated that the Neise trust deed was executed and recorded but that neither the trustee nor the holder of the note thereby secured had

appeared before him. The report does not mention the Barnard judgment.

The decree of partition was entered February 6, 1913. It declares the rights of the respective tenants in common in the real estate subject to the lien of the Foreman and the Neise trust deeds "as the interest of the holders thereof may appear," and appoints commissioners to make partition. The commissioners reported that partition could not be made. March 19, 1913, a decree of sale was entered, which ordered the master to sell the real estate subject to the lien of the Foreman trust deed and bring the proceeds of the sale into court to be distributed to the parties entitled thereto. The master sold the premises May 18th and made his report, showing the amount of money that would be in his hands when the purchaser paid the amount of his bid. June 11, 1913, an order of distribution was entered, which found that \$7,400 remained in the hands of the master after paying all costs and expenses. The master was ordered to pay one-half of the amount to Stevens, trustee, to Mary K. Plummer a sum equal to her dower interest in an undivided one-half of said premises, and the remainder to her as administratrix of William T. J. Plummer to be distributed and administered in due course of administration. June 13th Barnard moved to vacate the order of distribution and for leave to file petition, and his motion was entered and continued until the next term of court, and an order made that the master retain the proceeds of the sale until the further order of the court. June 16th Barnard filed his petition, alleged that he was the owner of the judgment recovered by him against William T. J. Plummer, and that there was due him thereon \$1,708.22 with interest thereon from October 17, 1910, and that he was the owner of the note secured by the Neise trust deed, and there was due him thereon the face of said note with interest from February 1, 1909, and \$47.54 for interest accruing

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before that date; that by virtue of petitioner's trust deed he was entitled to receive out of the proceeds of the sale of the whole of said real estate the amount due him thereon, and by virtue of his judgment was entitled to receive out of that part of the proceeds of the sale which represented the undivided one-half interest of William T. J. Plummer the balance due him on his judgment; that if the proceeds of sale are distributed as ordered, his rights under his trust deed and judgment will be lost; that the estate of William T. J. Plummer is insolvent. Mary K. Plummer answered the petition. November 26th the master filed his report of distribution, from which it appears that \$3,500 of the proceeds of the sale was deposited by the stipulation of the parties with the Chicago Title & Trust Company as a condition under which that company would issue a guaranty policy on the premises sold. February 24, 1915, an order was entered whereby the court found that the order of distribution entered June 11, 1913, was improper and not in accordance with the decree of partition entered February 6, 1913, and ordered that the same be set aside; and further found that Barnard was the owner of the note secured by the Neise trust deed on which \$2,865.14 was due, and was entitled to receive said sum before any other distribution was made; that he was also the owner of the judgment against William T. J. Plummer, which is a valid lien on one-half of the proceeds of the sale, being that portion representing the undivided one-half of said real estate owned by said William T. J. Plummer at his death, and was entitled to receive out of the net proceeds of the sale of such undivided one-half, after payment of the amount due on the Neise trust deed and the dower of Mary K. Plummer, \$1,764.02, the amount due on said judgment, before any distribution of the proceeds of the sale of said one-half of said real estate was made, and an order was entered in accordance with the findings of the court. From this

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order the present appeal is prosecuted by Mary K. Plummer individually and as administratrix of William T. J. Plummer.

RYAN, CONDON & LIVINGSTON, for appellant; IRVIN I. LIVINGSTON, of counsel.

JOHN S. HUMMER and JAMES A. RUSSELL, for appellee E. M. Barnard, Jr.

MR. JUSTICE BAKER delivered the opinion of the court.

The evidence taken before the master sustains the findings of the court, and the question presented is as to the jurisdiction and authority of the court to vacate the first order of distribution and enter the order from which this appeal is prosecuted, and the propriety of the order.

The presumption of law is, in the absence of proof to the contrary, that the Neise trust deed executed by Martha E. Trundle, and the Barnard judgment against William T. J. Plummer, were subsisting and valid liens—the trust deed on the whole, and the judgment on the undivided one-half, of the real estate. *Graham v. Anderson*, 42 Ill. 514; *Norton v. Joy*, 6 Ill. App. 406.

The statute requires the court, in a decree for partition, to “ascertain and declare the rights, titles and interest of all parties to such suit”; but the holder of a judgment against one of the parties in interest has no right, title or estate in the lands.

The claims and legal obligations against the estate sought to be partitioned should be borne by the shares set off to the several owners, or, in case of a sale of the land, should be paid from the fund; but provision to that effect may be made by the confirmatory decree and need not be contained in the decree for partition. *Brown v. Sunderland*, 251 Ill. 523.

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“If (in a partition case), upon the coming in of the report of the commissioners, it is found necessary to sell the land, the court may ascertain the amount due on the mortgage debt, and order it paid out of the distributive share of the mortgagor in the proceeds of the sale. But that may be done even after the sale.” *Spencer v. Wiley*, 149 Ill. 56-59.

If in a partition case the land is sold subject to the lien of an existing mortgage, the decree of sale should state the amount due, in order that the purchaser may know what obligations are standing against the land he purchases. If sold free and clear of an existing mortgage, it is unnecessary for the court, prior to the decree of sale, to ascertain the amount of the incumbrance, because, in such case, whatever the amount may be it follows and attaches to the proceeds of the sale. *Kilgour v. Crawford*, 51 Ill. 249.

Where a bill for partition alleges the existence of a mortgage on the premises and the mortgagee fails to appear and produce proof at the hearing of the amount due on the mortgage, then if a sale is necessary the proper course is to decree a sale of the premises free and clear of the lien of the mortgage, and direct the proceeds to be brought into court, when the court may enter a rule that the money be paid within a certain time unless the mortgagee should, before that time, make proof of the mortgage and the amount due thereon. *Kilgour v. Crawford, supra*.

Where a bill is taken as confessed in a partition case, if the court has reason to believe, or from any cause is apprehensive, that injustice is likely to result from ordering a distribution of the proceeds of the sale without proof, then it should be required. *Sullivan v. Sullivan*, 42 Ill. 315.

Barnard, by failing to answer, admitted only the truth of the allegations of the bill. The bill alleged the execution and recording of the Neise trust deed, and alleged that it was in full force, alleged that Barnard

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recovered a judgment against William T. J. Plummer, on which execution had been issued and returned unsatisfied, and alleged that the judgment was unsatisfied of record.

The facts stated in the bill clearly showed that injury was likely to result to the owner of the judgment and the owner of the note secured by the Neise trust deed if, without proof, the court ordered the proceeds of the sale distributed without making provision for the payment of the note or judgment. The proper practice, under the facts appearing in the record, would have been to enter a rule that the money be paid as provided in the decree of distribution unless the judgment creditor and the owner of the note secured by the Neise trust deed should appear by a certain time and make proof of the judgment and mortgage; and the court should have required proof as to the rights of Barnard before entering a decree of distribution. He had a right to be heard before a distribution of the proceeds of the sale was made. *Ellis v. Dumond*, 259 Ill. 483.

The motion to vacate the decree of distribution was made two days after the decree was entered and at the same term, and the hearing of the motion was continued.

We think the decree appealed from was properly made in furtherance of equity and justice, and it is affirmed.

Affirmed.

Jacob L. Kesner, Appellee, v. Charles Truax and Willard T. Block, appeal of Willard T. Block, Appellant.

Gen. No. 20,350.

1. TRIAL, § 68*—*when counter-affidavits inadmissible*. Counter-affidavits read on a motion to open a judgment by confession, which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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are not filed and are withdrawn before the conclusion of the hearing, cannot be considered as in the case as evidence, but the decision on the motion will be held to have been made on other evidential facts.

2. **APPEAL AND ERROR, § 1380***—*when motion to vacate judgment addressed to discretion of court.* An application to vacate a judgment is addressed to the sound discretion of the court and on appeal, unless the court of review can say from the evidential facts in the record that such discretion has been abused or inequitably exercised, the judgment appealed against will not be disturbed.

3. **JUDGMENT, § 281***—*when laches a ground for refusal to open judgment by confession.* A motion to open a judgment by confession and for leave to plead and defend being analogous to a motion to vacate a judgment by default, the rule as to laches in default cases applies, and a long delay after judgment in making such motion is negligence constituting laches sufficient to bar relief.

4. **JOINT TENANCY, § 3***—*when possession by one tenant is possession by the other.* Where one of cotenants equally bound by the lease and having joint rights and obligations is in possession, such possession is the possession of both.

5. **LANDLORD AND TENANT, § 216***—*when failure to make changes not ground for cancellation of lease.* Where a tenant enters upon the term and receives possession, he cannot cancel a lease on the ground of the landlord's failure to make changes and improvements covenanted to be made in the lease, but subject to no time limit, by giving notice after so taking possession.

6. **LANDLORD AND TENANT, § 310***—*when tenant not released by a note given by cotenant.* The giving of a note by one of two cotenants with collateral security for rent past due does not release the other from the obligation imposed upon him by reason of his being a lessee in the lease nor relieve him from his covenant to pay rent.

7. **LANDLORD AND TENANT, § 6***—*when lease not tentative.* Evidence in action for rent examined and *held* not to support contention that lease was only tentative.

Appeal from the Superior Court of Cook county; the Hon. HUGO PAM, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

LYMAN, ADAMS & BISHOP, for appellant.

D'ANCONA & PFLAUM, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is an appeal by Willard T. Block from an order denying his motion to open a judgment by confession for \$16,000 against himself and his colessee, Charles Truax, entered in virtue of a power of attorney contained in a certain lease to both of them of parts of the premises numbered 116 South Michigan avenue, Chicago, and for permission to plead to the action. The judgment was for rent of the demised premises from February 1st to September 30, 1912, and does not include any amount for attorneys' fees.

There is no dispute concerning the execution and delivery of the lease. The judgment was entered November 7, 1912, and the motion of appellant to be let in to plead filed January 25, 1913. The motion was fortified with the affidavit of appellant; and his codefendant, at his instance, gave oral testimony upon the hearing. Counter-affidavits were read by counsel for Kesner, but were not filed and before the conclusion of the hearing were withdrawn. It appears that the lessees contemplated forming a corporation to carry on business upon the leased premises, and an addenda to the lease was made, providing that when such corporation was formed the lease might be assigned to it, the lessees, however, remaining liable for the performance of all the covenants of the lease obligatory upon them thereunder. After default in the payment of some rent, Truax gave a note to Kesner with collateral security as additional security for its payment. Certain alterations and changes in the leased premises were covenanted to be made by the lessor, but no time for the completion thereof was fixed upon. The lessees were allowed by the terms of the lease to move into the demised premises their trade fixtures at any time after the execution of the lease and before the commencement of the term demised. Such fixtures were placed in the premises soon after the lease was executed, and the lessees through Truax took possession at about the same time. Appellant, on January 8,

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1912, wrote a letter to the lessor that he withdrew from the lease because improvements agreed to be made were not made by January 1, 1912. Thereafter the lessor replied to this letter denying that delay in making the improvements was his fault, claiming it was occasioned solely through lessees changing their ideas, necessitating corresponding alterations. Appellant also wrote his cotenant, Truax, informing him of his letter to Kesner. It also appears that at the end of September, 1912, Truax removed from the premises, Block, the appellant, never having personally taken possession. Whatever possession appellant had was constructive and arises from the possession of his cotenant, Truax.

The counter-affidavits, portions of which were read by appellee upon the hearing of the motion, never having been filed, were ultimately withdrawn from the consideration of the court. While such affidavits in certain circumstances are admissible (*Farrior v. Mickle*, 133 Ill. App. 444), yet in the condition of this record we must hold that they are not and never were in this case as evidence, and that the decision of the court upon appellant's motion was based solely on the other evidential facts, and that the court disregarded these counter-affidavits.

An application to vacate a judgment is addressed to the sound discretion of the court (*Blake v. State Bank of Freeport*, 178 Ill. 182), and unless the court of review can say from the evidential facts in the record that such discretion has been abused or inequitably exercised, the judgment appealed against will not be disturbed. *Mumford v. Tolman*, 157 Ill. 258; *Kloepfer v. Osborne*, 177 Ill. App. 384.

The court says in the *Osborne* case, *supra*, that "although it may be shown that the defendant has a good defense, a default will not be set aside if the defendant, or his attorney, has been guilty of negligence." A motion to open a judgment by confession

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and for leave to plead and defend is analogous to a motion to vacate a judgment obtained by default, and the rule as to laches in default cases is applicable. We think that the long delay of appellant after judgment in making his motion was negligence on his part, which negligence constituted laches sufficient to bar him from obtaining relief.

Appellant and Truax were cotenants and both were equally bound by the lease. Their rights and obligations were joint, and the possession of Truax operated in law as the possession of both. The changes and improvements covenanted to be made in the lease are subject to no time limit, but had the landlord been in default as to such covenant, appellant could not cancel the lease by the notice he gave or thereby evade his liability as tenant in possession; for, as said in *Reno v. Mendenhall*, 58 Ill. App. 87: "If a landlord covenants to repair before the term commences, the tenant might refuse to enter upon the term until the repairs are made, but having entered upon the term and received possession, he cannot abandon the lease and refuse to pay rent for the breach of that covenant." The giving of the note by Truax with collateral security for rent past due in no way tended to release appellant from the obligation imposed upon him by reason of his being a lessee in the lease or to relieve him from his covenant to pay rent.

The contention of appellant that the lease in the record was only of a tentative nature finds no support in that document.

The record failing to show that appellant has any meritorious defense to the claim for rent for which the judgment found in the record was confessed, the judgment of the Superior Court is affirmed.

Affirmed.

New Idea Arc Light Co. v. Renneker Co., 195 Ill. App. 290.

**New Idea Arc Light Company, Plaintiff in Error, v.
G. C. Renneker Company, Defendant in Error.**

Gen. No. 20,390. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915.

Statement of the Case.

Action by New Idea Arc Light Company, a corporation, plaintiff, against G. C. Renneker Company, a corporation, defendant, for a balance due on goods sold and delivered.

This action was based upon three written contracts for the sale by plaintiff to defendant of thirteen electric lamps at the price of \$15 each, payable in instalments. The lamps were installed and \$24 paid on the total purchase price of \$195. Defendant contended that the lamps did not perform the work for which they were bought, and counterclaimed against plaintiff's claim the \$24 it had paid on account. The trial court found the issues for the defendant on the counterclaim and gave judgment in its favor for \$24, and plaintiff prosecutes this writ of error in an effort to reverse the judgment.

There was evidence that the plaintiff was a manufacturer of the lamps contracted to be sold to defendant; that defendant operated printing presses which caused considerable vibration, and that the lamps which defendant was using were often broken by reason of the vibration; that it was represented to defendant at the time of the sale that plaintiff's "New Idea" lamps would withstand the vibration without breaking; that the lamps sold were to take the place of the ones then in use, which were discarded and the "New Idea" lamps installed in their stead; that the "New Idea" lamps did not fulfil the purpose for which they were bought and which plaintiff knew they were

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intended to serve; that the new lamps did not withstand the vibration caused by the running of the presses, but constantly broke so that they could not be used successfully to light the presses.

Defendant offered to return the lamps and demanded that the instalment of \$24 paid to plaintiff be returned to it. Plaintiff refused either to pay the \$24 or receive back the lamps, and defendant thereupon put the lamps in storage and notified plaintiff of that fact.

LEON A. BEREZNIAK and H. L. CAVENDER, for plaintiff in error; H. L. CAVENDER, of counsel.

FRANK B. MURRAY, for defendant in error; O. A. ARNSTON, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 360*—*when parol evidence admissible to show relation of parties to contract to each other.* In an action on a written contract, evidence of the relation of the parties to each other when the contract was made is admissible to enable the court to construe the contract in that light.

2. SALES, § 282*—*when evidence sufficient to show breach of implied warranty.* Evidence in action for purchase price of goods, examined and held to show breach of implied warranty as to suitability of goods for use for which purchased.

3. SALES, § 252*—*when warranty of suitability of goods implied.* When a manufacturer of articles sells them for a specific use, there is an implied warranty on his part that they are reasonably fit for such use.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dresen v. Metropolitan Life Ins. Co., 195 Ill. App. 292.

John Dresen, Defendant in Error, v. Metropolitan Life Insurance Company, Plaintiff in Error.

Gen. No. 20,464.

1. **INSURANCE, § 84***—*when lack of insurable interest avoids life policy.* A policy of life insurance naming as beneficiary a person who has no insurable interest in the life of the insured is a wager policy and void.

2. **INSURANCE, § 84***—*when taking out policy and payment of premium by insured does not cure lack of insurable interest.* The fact that the insured took out the policy in the first instance and paid the first premium before delivering the policy to the beneficiary does not validate a life policy naming as beneficiary one having no insurable interest.

3. **INSURANCE, § 332***—*when notice to agent does not validate life policy naming beneficiary having no insurable interest.* Notice by a beneficiary of a life policy to the collecting agent of the insurer that he is neither a cousin nor next of kin to the insured is not a waiver by the insurer of the beneficiary's lack of interest, though he is designated in the policy as cousin of the insured.

4. **INSURANCE, § 84***—*when statement in application insufficient to create insurable interest.* The statement by the insured, in an application for insurance, that the reason for naming the beneficiary is because he contributes to her support and will care for her in case of her death is insufficient to create an insurable interest.

5. **INSURANCE, § 84***—*when moral claim insufficient to constitute insurable interest.* A moral claim of the insured in a life policy upon the beneficiary named therein for support during her lifetime does not constitute an insurable interest.

6. **INSURANCE, § 159***—*when beneficiary without insurable interest not entitled to premiums.* One named a beneficiary in a life insurance policy who had no insurable interest in the insured is not entitled to receive back premiums paid by him, such payments being considered as made as agent and being due to the estate of the insured, if returned.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 1, 1915.

HOYNE, O'CONNOR & IRWIN, for plaintiff in error;
CARL J. APPELL, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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A. W. FULTON and ALBERT SCHAFFNER, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Annie Kasen in her lifetime took out a policy of insurance upon her life for \$210 in the defendant company and named therein as the beneficiary the plaintiff, who was designated in the policy as bearing towards her the relationship of cousin. Annie Kasen paid the first three premiums, the remaining premiums being paid by plaintiff, to whom the policy was delivered by the insured. Annie Kasen died in November, 1913. Plaintiff, having made proofs of the death of the insured and delivered the same to the defendant company, and payment of the amount of the insurance being upon demand refused, brought this suit. The trial was before the court and jury, resulting in a verdict and judgment in favor of plaintiff and against defendant for the amount of the policy. Motions by defendant for a new trial and in arrest of judgment being overruled, it prosecutes this writ of error to reverse the judgment.

While several reasons are argued by defendant why the judgment should be reversed, we shall dispose of the case upon the one fact that plaintiff had no insurable interest in the life of the insured, which fact makes the policy void as a "wager contract" and therefore against public policy.

Plaintiff admitted on the trial that he was not a cousin of the insured or any other blood relation of hers. Nor does it appear that he was a creditor of the insured or that he sustained any other relationship to her which, under the law, would give him an insurable interest in her life. The fact that the insured took out the policy in the first instance and paid the first premium before delivering the policy to plaintiff does not change the situation. The fact that plaintiff paid

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substantially all the premiums from the time the policy was issued, and had the policy in his actual possession from about the date of its issue, may be said to demonstrate that he indirectly procured the policy to issue upon the life of the insured for his benefit. The fact that plaintiff informed the collecting agent of defendant, when premiums were paid by him, that he was neither a cousin nor of kin to the insured, cannot be held as a waiver by defendant of the lack of an insurable interest of plaintiff in the life of the insured. Even the solemn agreement of the parties to that effect could not override the public policy of the State which the transaction involves. By that public policy, the lack of an insurable interest of the beneficiary in the life of the insured makes the policy void. The insured in her application for the policy stated as a reason for naming plaintiff as her beneficiary, "because my cousin, John Dresen, contributes to my support and would care for me in case of my death." Even if this statement were true, it would be unavailing to create an insurable interest of plaintiff in the life of the insured, because whatever he did or might do in the way of caring for the insured, either in her lifetime or after her death, would be voluntary and could not by law be compelled, she being neither of kin to nor legally dependent upon plaintiff. Had the insured a moral claim upon plaintiff for support in her lifetime, this would not constitute an insurable interest in her life in favor of plaintiff. A policy of life insurance naming as beneficiary a person who has no insurable interest in the life of the insured is a wager policy and void. *Guardian Mut. Life Ins. Co. of New York v. Hogan*, 80 Ill. 35; *Golden Rule v. People*, 118 Ill. 492; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. 249

While premiums paid upon the policy were tendered by defendant to plaintiff and refused by him, we are unable to say that, under the circumstances shown in this record, plaintiff was entitled to receive such

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premiums, as, in paying them, he must be regarded as having acted for the insured. Consequently, if these premiums are due from defendant to any one, they are due to the estate of the insured, for in the circumstances of this case there is no privity of contract between the plaintiff and the defendant.

The trial judge erred in not instructing the jury, at the close of plaintiff's case, to find a verdict for defendant, the proof showing that plaintiff had no cause of action upon the policy in question against the defendant. For this reason the judgment of the Municipal Court is reversed and, as there can be no recovery, the cause is not remanded.

Reversed.

William J. Kelly, Defendant in Error, v. Mary M. Good, Plaintiff in Error.

Gen. No. 20,539. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed November 1, 1915.

Statement of the Case.

Action by William J. Kelly, plaintiff, against Mary M. Good, defendant, to recover rent. A trial before the court resulted in a judgment for \$104, the sustaining of the right of the plaintiff to levy the distress warrant, the taxing of costs at \$6 for appraiser's fees and \$42 for custodian fees, and ordering special execution against the property distrained as well as a general execution. To reverse the judgment, defendant prosecutes this writ of error.

Plaintiff, claiming that defendant owed him for rent \$114, issued his distress warrant, and, while it does

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not appear to have been executed, certain personal property of defendant was distrained and two custodians placed in charge of it. Defendant in her affidavit of merits asserted as a defense to \$85 of her landlord's claim that she gave her note for \$85 in settlement of that amount of rent, and that the only rent due and unpaid at the time of levying the distress warrant was \$20.

Defendant testified that she settled with one J. A. Lucas, the agent of defendant, for the rent due to February 1, 1914, by giving to him her note for \$85. The giving of this note was admitted, but through Lucas, his agent, plaintiff denied that it was given in payment of rent, and asserted that he destroyed the note and did not therefore have it in his possession. On the question of the giving of the note in payment of the rent, the trial judge seemed to be in doubt and expressed a wish to have plaintiff present in court for interrogation as to whether it was received in payment or as collateral. Thereupon Lucas stated: "I cannot bring in the landlord, for the reason that the landlord is absent from the city; Kelly is a traveling salesman and he is in Texas." When the plaintiff was produced in court he testified that at the former hearing he was at home and that Lucas told him to stay at the premises rented to defendant and not to allow any one to enter them, and that "when Mrs. Good returned to the premises I did not allow her to enter."

LEON A. BEREZNIAK, for plaintiff in error; CAVENDER, KAISER & WERMUTH, of counsel.

BOLTON & MORIARTY, for defendant in error; MAURICE J. MORIARTY, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

American Heating & Plumbing Corp. v. Salomon & Co., 195 Ill. App. 297.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 325*—*when evidence insufficient to support claim for rent.* Evidence examined and *held* to show that tenant was entitled to credit on amount claimed to be due for rent.

2. WITNESSES, § 257*—*when conduct tends to discredit testimony.* A false statement made to the trial court by a witness, knowingly and intentionally, tends to discredit his uncorroborated testimony as to other matters.

**American Heating & Plumbing Corporation, Plaintiff
in Error, v. William E. Salomon & Company,
Defendant in Error.**

Gen. No. 20,606. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Reversed and judgment here. Opinion filed November 1, 1915.

Statement of the Case.

The defendant, the general contractor for the building of the "Iris Theater" at No. 5743 West Chicago avenue in Chicago, on the 29th day of November, 1913, entered into a contract with plaintiff for the installing of a heating and ventilating plant in said "Iris Theater." The contract price was \$2,700, which was to be paid, \$1,000 "when boiler and radiators are delivered on the premises," a like amount "when steam is turned on plant," and the remainder "twenty days after plant is completed, tested and accepted by superintendents." The amount involved in this suit is the \$1,000 payable "when steam is turned on plant." The defenses interposed are that plaintiff has neither complied with nor completed its contract; that no money is due plaintiff under the contract and that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plaintiff has failed to comply with the mechanic's lien law of the State. The hearing was before the court, who found the issues for the defendant and entered a judgment of *nil capiat* and for costs against plaintiff, who brings this writ of error in an effort to reverse that judgment.

The first payment of \$1,000 was made in accord with the contract without any question or dispute. The first contention of plaintiff is that the provision for the payment of the sum here demanded, "when steam is turned on plant," means, by interpretation, when steam is generated in the boiler, circulates through the steam mains and branches leading to the radiators, with steam in the radiators, and the plant is in operation. Plaintiff maintains that the term "when steam is turned on plant" is a trade term, having a significance known to the trade, which significance, under well-settled principles of law, is to be ascertained and followed as entering into the contract and as being presumably known to the parties at the time the contract was made. The parties introduced evidence of witnesses to sustain their respective contentions.

J. S. DUDLEY, for plaintiff in error; WILLIAM R. WILEY, of counsel.

FRANCIS E. CROARKIN, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 361*—*when parol evidence admissible to show meaning of technical terms.* Parol evidence is admissible to show that certain words and phrases used in a contract have a known and established meaning among dealers engaged in the class of trade which is the subject of the contract.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Geist et al. v. Kaplan, 195 Ill. App. 299.

2. **APPEAL AND ERROR, § 1471***—*when admission of parol evidence not ground for reversal.* In an action on a written contract where both parties offer parol evidence as to the meaning given by the trade to a certain phrase, neither party can avail of any objection to such evidence on appeal.

3. **CONTRACTS, § 198***—*what interpretation to be given to trade term.* In an action on a contract for installing a heating and ventilating plant, a provision calling for the payment of a certain part of the contract price "when steam is turned on plant" is to be construed in accordance with the significance given to the term by the trade.

4. **CONTRACTS, § 198***—*how trade term construed.* The provision in a contract for installing a heating and ventilating plant that the second instalment of the purchase price shall be paid "when steam is turned on plant" is to be construed as meaning when steam is generated in the boiler, circulates through the steam mains and branches leading to the radiators, and the plant is in operation.

5. **CONTRACTS, § 246***—*when certificate not essential to payment of part of contract price.* If the contract makes no provision that a certificate of the superintendent, that the instalment of the contract price is due, shall be procured before the payment of the instalment, such a certificate is not prerequisite to a right to demand the payment of such instalment where the terms of the contract have been complied with and the work performed.

6. **MECHANICS' LIENS, § 61***—*when Act not applicable to subcontractor.* Section 5 of the Mechanic's Lien Act (J. & A. § 7143) does not apply to subcontractors.

7. **MECHANICS' LIENS, § 66***—*when verified statement by subcontractor not necessary.* A request for a verified statement from a subcontractor under section 22 of the Mechanic's Lien Act (J. & A. § 7160) comes too late when made after the subcontractor has abandoned the contract for the other party's breach, and letters thereafter written making such request are inadmissible.

C. F. Geist and J. W. Geist, Trading as Geist Brothers, Defendants in Error, v. Louis Kaplan, Plaintiff in Error.

Gen. No. 20,700. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BETLER, Judge, presiding. Heard in this court at the October term,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Geist et al. v. Kaplan, 195 Ill. App. 299.

1914. Affirmed. Opinion filed November 1, 1915. Rehearing denied November 15, 1915.

Statement of the Case.

Action by C. F. Geist and J. W. Geist, trading as Geist Brothers, against Louis Kaplan, defendant, to recover \$242.50 alleged to be due as rent under a lease from plaintiffs to defendant. There was a confession of judgment, under power of attorney so to do, contained in the lease for the sum of \$242.50.

Defendant made a motion to be let in to defend, which motion the court denied. To reverse the judgment, defendant prosecutes this writ of error.

Defendant in his affidavit, upon which he grounds his motion to be permitted to defend, sets up that he sold his business carried on in the demised premises and assigned the lease to Osias Moskowitz, and that a clerk of the agent of plaintiffs accepted a surrender of the lease and of the demised premises and accepted Moskowitz as tenant in defendant's stead. Defendant also set up that there have been material alterations in the lease, made by some one not disclosed.

That such alteration was authorized or made by any one having authority from the landlord, nowhere appears, nor is it claimed by defendant that such surrender was by authority emanating from the plaintiffs.

EDWARD J. KELLEY, for plaintiff in error.

RINGER, WILHARTZ, LONER & CONCANNON, for defendants in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1380*—*when leave to defend after confession a matter of discretion.* The granting of leave to defend after

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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judgment has been confessed, under power contained in a lease, is a matter addressed to the sound discretion of the court, and unless it can be said that there has been an abuse of discretion, the court of review will not disturb the action of the trial court.

2. LANDLORD AND TENANT, § 325*—*when evidence insufficient to show alteration of lease.* In an action by a lessor against a lessee for rent, a naked charge in the affidavit of defendant that the lease was materially altered or changed after its execution, without a showing that the alteration was authorized or made by any one having authority from the landlord, is an insufficient defense.

3. LANDLORD AND TENANT, § 418*—*when lessee not released by assignment to third person.* A lessee is still liable for the rent payable under the lease notwithstanding the assignment of the lease to a third person, unless he is relieved from that liability by the landlord or some one acting under the landlord's direction.

4. ALTERATION OF INSTRUMENTS, § 24*—*when materiality question of law.* The question of the materiality of an alteration in a written instrument is one of law for the court and not of fact for the jury.

William C. Clingen, Charles H. Newman and Emil Feldman, trading as Clingen Curtain System, Appellees, v. Carter H. Harrison, Mayor, William H. Sexton and James Gleason, Appellants.

Gen. No. 20,815.

1. MANDAMUS, § 1*—*when injunctional order not to be included in.* Mandamus and injunction cannot be granted in the same order nor in the same cause.

2. MANDAMUS, § 1*—*how distinguished from injunction.* The writ of mandamus commands a thing to be done; the writ of injunction restrains the doing of an act; mandamus is a legal civil proceeding; the remedy by injunction is solely equitable.

3. MANDAMUS, § 177*—*when order objectionable as including injunctional order.* An order of mandamus directing a municipal officer to issue a permit of a motion picture which also provides that "to give full effect and force to the process and mandamus of this court, you and your agents, servants and employees and agents, servants and employees of the City of Chicago and the successor in office to you, are hereby restrained and commanded to refrain from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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interference in the exhibition of the films aforesaid until the further order of this court," is objectionable as including injunctive provisions.

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 1, 1915.

WILLIAM H. SEXTON, for appellants; MAX M. KORSKAK and GEORGE L. REKER, of counsel.

No appearance for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The Circuit Court awarded a writ of mandamus in this case against James Gleason as General Superintendent of Police of the City of Chicago, directing him to issue a permit for the exhibition of a motion picture called "Magda, A Modern Madam X." To the mandamus part of the order appellants do not complain. They do, however, complain against that part of the order which is in its terms injunctive, and they moved the trial court to expunge it from the order, which motion being denied, appellants prosecute this appeal.

That part of the order said to be erroneous is encompassed within the following words: "And to give full effect and force to the process and mandamus of this court, you and your agents, servants and employees and agents, servants and employees of the City of Chicago and the successor in office to you, are hereby restrained and commanded to refrain from interference in the exhibition of the films aforesaid until the further order of this court."

The part of the so-called mandamus order recited above is in its essence and purport injunctive. It is the rule in this and other jurisdictions, where the distinction between law and equity jurisdiction obtains, that mandamus and injunction cannot be granted in the same order or in the same cause. These actions

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are separate and distinct both in their essence and operation. The writ of mandamus commands a thing to be done, while the writ of injunction restrains the doing of acts or things. Each is foreign to the other and has its separate and distinctive functions. The remedy by mandamus has no equitable function. It is a legal civil proceeding. The remedy by injunction is solely equitable and is jurisdictional in a court of equity and in no other forum. The text writers, such as Merrill on Mandamus and High on Extraordinary Legal Remedies, are in accord on this proposition, and our own Supreme Court has adhered to the same doctrine. In *People v. Crabb*, 156 Ill. 155, it was directly held that a mandamus proceeding is an action at law and is governed by the same rules of pleading that are applicable to other actions at law. In *Fletcher v. Tuttle*, 151 Ill. 41, it was held that "where the established distinctions between equity and common-law jurisdiction are observed, injunction and mandamus are not correlative remedies"; and in volume 13, Encyc. of Pl. and Pr., 491, it is stated, with ample supporting authority, that in nearly all the States mandamus is considered a common-law remedy and is held to have no connection with equitable jurisdiction, and it is also held that the procedure in equity is not applicable.

The order appealed from being erroneous in the particulars above pointed out, the judgment of the Circuit Court is reversed, and as the mandatory part of the injunction is at this time a moot question, the cause is not remanded.

Reversed.

Devine v. Chicago City Ry. Co., 195 Ill. App. 304.

John F. Devine, Administrator, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 20,868. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 1, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by John F. Devine, administrator of the estate of David Kaufman, plaintiff, against Chicago City Railway Company, defendant, to recover damages of defendant for negligently causing the death of plaintiff's intestate. From a verdict and judgment for plaintiff for \$3,000, defendant appeals.

Plaintiff contends that defendant's car, while at a standstill and taking on passengers, suddenly and without warning started while deceased was in the act of boarding it, with one foot on the running board, causing him to be thrown to the ground, inflicting injuries from which he shortly thereafter died.

The deceased was with his wife and other friends, all of whom were boarding the car, and all but deceased succeeded in so doing without accident. All these persons, including the deceased, were in clear view of the conductor and their purpose of boarding the car while it was stationary was apparent.

The plaintiff's intestate, at the time of suffering the injuries which it is claimed resulted in his death, was seventy-one years of age. An autopsy disclosed that at the time of his death certain of his internal organs were diseased, including his heart, kidneys and stomach.

There is no evidence that deceased was consciously suffering from any fatal malady on the day of his death or that he had complained of any particular physical distress. At the time of the accident he was going about his usual affairs and was on his way to

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visit at the house of a friend. His widow testifies that he had not been recently treated by a medical man and had not taken to his bed on account of sickness for more than five years prior to his death. These facts appear from her testimony: "Before this accident my husband looked well and seemed perfectly well. * * * I do not know of my husband being under the doctor's care before this accident for anything except—I guess it is ten or fifteen years ago. * * * Before this accident he was not in bed, I am sure not in five years, for any cause."

JAMES G. CONDON and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

JAMES C. McSHANE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 476*—*when evidence sufficient to support verdict finding negligence in starting car.* In an action against a street railroad company to recover for the death of plaintiff's intestate alleged to have been caused by the negligence of defendant's servant in starting the car before the intestate had a reasonable opportunity to board it, the evidence examined and *held* to support a finding that defendant was negligent.

2. CARRIERS, § 367*—*what duty owed to persons boarding car.* Where persons intending to board a street car are in clear view of the conductor and their purpose of boarding the car while it is stationary is apparent, it is the duty of the conductor not to start the car until all of them are safely on and to give them sufficient time to board it.

3. CARRIERS, § 476*—*when evidence sufficient to show that negligence was proximate cause of death.* In an action against a street railroad company to recover for the death of a person alleged to have been caused by defendant's negligence in starting its car as deceased was attempting to board it, the evidence examined and *held* sufficient to support a finding that the injury resulted by the starting of the car was the proximate cause of his death and that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

De Vincenzo v. Chicago Ry. Co., 195 Ill. App. 306.

the death was not due to diseases with which he was afflicted at the time the injury was received.

4. **EVIDENCE, § 387***—*when expert's opinion as to cause of death admissible.* In an action against a street railroad company to recover for the death of a person alleged to have been caused by the starting of defendant's car while he was in the act of boarding it, where it is not disputed that the immediate cause of death was edema of the lungs, it is competent for an expert medical witness to give his opinion as to the cause of the edema.

5. **APPEAL AND ERROR, § 1474***—*when admission of evidence not ground for reversal.* The admission of opinion evidence is not ground for reversal even though the objection thereto is well founded, where evidence of a like character was introduced by both parties.

Pasqualino DeVincenzo, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 21,020. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of fact. Opinion filed November 1, 1915.

Statement of the Case.

Action by Pasqualino DeVincenzo, by his next friend, plaintiff, against Chicago Railways Company, defendant, to recover for injuries alleged to have been received by being struck by defendant's car while crossing defendant's track. A trial before court and jury resulted in a verdict and judgment for \$750, from which defendant appeals.

The evidence showed that plaintiff was struck by a car of defendant while he was crossing on or near the Sangamon street viaduct from the east to the west side of the same. The accident is accounted for by plaintiff as due to dense smoke emanating from railroad engines passing under the viaduct which obscured his view of defendant's car.

The People v. Fisher, 195 Ill. App. 307.

CHARLES L. MAHONEY and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

BOLTON & MORIARTY and JOHN B. CALO, for appellee; MAURICE J. MORIARTY and JOHN B. CALO, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 111*—*when burden of showing due care on plaintiff in action for injury at crossing.* In an action against a street railroad company to recover for injuries alleged to have been received by being struck by defendant's car while crossing defendant's line at a viaduct over a railroad, while in the exercise of due care at and immediately before the happening of the accident, the burden is on the plaintiff of showing by preponderance of the evidence that he was in the exercise of such care regardless of any negligence of which the defendant may have been guilty, where the inability of plaintiff to see the car is claimed to have been due to dense smoke from railroad engines passing under the viaduct.

2. STREET RAILROADS, § 95*—*what degree of care required in crossing track where vision obscured.* One crossing a street railroad on a viaduct over a railroad when the track is obscured by dense smoke from steam engines is required to exercise caution and to be on the lookout for the approach of cars.

3. STREET RAILROADS, § 131*—*when evidence sufficient to show negligence in crossing track.* Evidence examined in action for personal injuries through being struck by street car, and held to show that plaintiff was guilty of contributory negligence in attempting to cross tracks where they were obscured by smoke from a nearby railroad.

The People of the State of Illinois ex rel. Maclay Hoyne, State's Attorney, Appellant, v. Harry M. Fisher, Judge, Appellee.

Gen. No. 21,753. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed November 8, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Fisher, 195 Ill. App. 307.

Statement of the Case.

Action by the People of the State of Illinois ex rel. Maclay Hoyne, State's Attorney, plaintiff, against Harry M. Fisher, Judge of the Municipal Court, in the Circuit Court of Cook county, praying for leave to file a petition in mandamus against the defendant, commanding him to grant leave to relator to file a criminal information against one Jacob L. Kesner, charging a violation of section 24 of the General Revenue Act of the State (J. & A. ¶ 9234). From an order denying such petition, plaintiff appeals.

MACLAY HOYNE, for appellant.

RICHARD S. FOLSOM, for appellee; JOHN E. FOSTER, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. TAXATION, § 19*—*Act of 1898 as providing new system for assessment of property.* The Act of 1898 (J. & A. ¶¶ 9516-9576) was intended to provide a new system for the assessment of property and not to amend the General Revenue Act, and as to that subject it is substantially complete in itself, constituting an entire plan for making the assessment.

2. STATUTES, § 146*—*when new statute prevails over old one.* Where the Legislature frames a new statute upon a certain subject-matter with an evident intention to revise the whole subject-matter legislated upon, there is in effect a legislative declaration that whatever is embraced in the new statute shall prevail, and that whatever is excluded is discarded, and that the provisions of the new law shall be substituted for those of the old.

3. TAXATION, § 19*—*what portions of general revenue law are superseded by the Act of 1898.* The language of section 55 of the Act of 1898 (J. & A. ¶ 9572), providing that "all the provisions of the general revenue law in force prior to the taking effect of this act shall remain in force * * * except in so far as by this act is otherwise expressly provided," does not mean that every section of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Beer v. Strode, 195 Ill. App. 309.

the general revenue law in force prior to the taking effect of the Act of 1898 shall remain in force unless the later act expressly provides otherwise, but also means that wherever the later act legislates on the subject-matter of the earlier, the earlier act shall fall, and such legislative intent is as clearly indicated thereby as though there were an express provision that the earlier law should not remain in force.

4. **TAXATION, § 199***—*when statute provides penalty for refusal to make and swear to schedule.* The provision in the Act of 1898 (J. & A. ¶ 9534) that on the refusal of a person to make and swear to a schedule of his property for taxation, the assessor shall list his property and add to the valuation an amount equal to fifty per cent. of such valuation, provides a penalty for such refusal.

5. **STATUTES, § 152***—*when statute imposing penalty is repealed by implication.* Where there are two statutes imposing a penalty and the penalty imposed by one is not the same as that imposed by the other, the later statute repeals the earlier by implication.

6. **MANDAMUS, § 16***—*when petition for leave to apply for writ properly denied.* Rev. St., ch. 120, sec. 24 (J. & A. ¶ 9238), providing that one required by law to list personal property who shall refuse, neglect or fail when requested by the proper assessor to do so shall be guilty of a misdemeanor, *held* repealed by implication by Act of 1898, sec. 19 (J. & A. ¶ 9534), providing that on the refusal of a person to make and swear to a schedule of his property therein required, the assessor shall list his property and add to the valuation an amount equal to fifty per cent. of such valuation, and hence a petition for a writ of mandamus to compel a judge to grant leave to file an information charging an offense under the act, is properly denied.

Henry J. Beer, Appellee, v. Maud A. Strode, Appellant.

Gen. No. 21,924. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. HARRY C. MORAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Appeal dismissed. Opinion filed November 9, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

National Bank of Commerce v. Church, 195 Ill. App. 310.

Statement of the Case.

Action of forcible detainer by Henry J. Beer, plaintiff, against Maud A. Strode, William Strode and A. J. Hastings, defendants, in the Circuit Court of Cook county. From a judgment for plaintiff for possession and for costs, defendants appealed. But one defendant having signed the appeal bond, plaintiff moved to dismiss the appeal.

SABATH, STAFFORD & SABATH, for appellant.

GEORGE F. BORMAN, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 657*—*when bond signed by one of several appellants insufficient.* Where an appeal to the Appellate Court is prayed by three defendants and allowed by the Circuit Court upon said defendants filing an appeal bond, a bond signed by only one of the appellants who prayed and were allowed the appeal is defective, and the appeal will be dismissed on motion of appellee, as the right of appeal is purely statutory and appellants must strictly comply with the order of the court granting the appeal, in order to entitle themselves to the right.

National Bank of Commerce, Appellee, v. Norman W. Church, Appellant.

Gen. No. 22,029. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Appeal dismissed. Opinion filed November 9, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Doyle et. al. v. Considine, 195 Ill. App. 311.

Statement of the Case.

Action by the National Bank of Commerce, a corporation, plaintiff, against Norman W. Church, defendant, in the Municipal Court of Chicago. From a judgment for plaintiff for \$10,817.33, defendant appeals. Plaintiff moves to dismiss the appeal on the ground that the appeal bond was not filed in time.

DUNNE & MURPHY, for appellant.

ROSENTHAL & HAMILL, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 671*—when bond filed after time insufficient. An appeal bond filed and approved after the time limited for such filing by the order granting the appeal is a nullity, and the appeal must be dismissed unless the judge granting the appeal shall before the expiration of the filing time make an order extending the time, as on the expiration of such time for appeal without an order extending the time, the court loses jurisdiction of an appeal in the cause.

William J. Doyle and James A. Doyle, Defendants in Error, v. John P. Considine, Plaintiff in Error.

Gen. No. 20,732.

1. **BILLS AND NOTES, § 334*—when indorsee may sue in own name.** A suit may be brought in his own name on a promissory note by an indorsee who received it in due course, for value and before maturity.

2. **BILLS AND NOTES, § 118*—when reference to collateral agreement does not affect negotiability.** A promissory note containing the statement, "This note is given in accordance with a land contract of even date between B and C," is negotiable within the meaning of the Negotiable Instruments Act (Hurd's Rev. St., ch. 98, sec. 21, J. & A. § 7642), which provides that a "promise to pay is unconditional

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Doyle et. al. v. Considine, 195 Ill. App. 311.

within the meaning of this act though coupled with *, * * a statement of the transaction which gives rise to the instrument," and an action may be maintained thereon by any holder in due course.

3. **BILLS AND NOTES, § 431***—*when evidence of collateral agreement inadmissible.* If a note be negotiable, evidence of the contract which gave rise to the note is incompetent although a reference be made thereto in the body of the instrument.

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 15, 1915.

C. S. O'MEARA, for plaintiff in error.

THOMAS B. LANTRY, for defendants in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

In a suit on a promissory note, plaintiffs had judgment for \$696.76, which defendant says should be reversed because (1) the suit can only be brought in the name of E. H. Bauch, the original payee, and (2) as the note contains a reference to a "land contract" it is not a negotiable instrument; and also it was error not to permit defendant to show what was done under this contract.

As to the first point, the note was indorsed by Bauch and plaintiffs received it in due course before maturity for value; hence they properly could bring suit.

As to the second point, the note says: "This note is given in accordance with a land contract of even date herewith between E. H. Bauch and J. P. Considine." By the Negotiable Instruments Act, ch. 98, sec. 21 (J. & A. ¶ 7642), it is provided that a "promise to pay is unconditional within the meaning of this act, though coupled with * * * a statement of the transaction which gives rise to the instrument." That is this case, and the instrument is negotiable, and an inquiry into the contract was incompetent. The judgment is affirmed.

Affirmed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conway Co. v. City of Chicago et al., 195 Ill. App. 313.

R. F. Conway Company, Appellant, v. City of Chicago et al., Appellees.

Gen. No. 20,822. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 15, 1915.

Statement of the Case.

Bill by R. F. Conway Company, a corporation, plaintiff, against the City of Chicago and others, defendants, in the Circuit Court of Cook county, to restrain the enforcement of and to determine the question of liability under a contract for constructing a public improvement. From an order dismissing the bill for want of equity, plaintiff appeals.

TOLMAN & REDFIELD, for appellant.

JOHN W. BECKWITH and JOSEPH F. GROSSMAN, for appellees.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 751*—*when facts and conclusions in order not reviewable.* An order dismissing a bill for want of equity should not, as a matter of proper practice, recite facts and conclusions from the evidence, and on appeal such facts and conclusions, if recited, are not before the Appellate Court for review.

2. INJUNCTION, § 72*—*when enforcement of contract not restrained.* A contract whereby a contractor agrees to construct a wooden pavement in a street, and as a guaranty of the faithful performance of the agreement further agrees to keep the same in a satisfactory condition for a term of years without additional cost to the contractee, is not so unreasonable as to require the interference of a court of equity to restrain its enforcement, for the reason that a guaranty of the durability of an improvement constructed by the guarantor has reference not only to the materials used and to the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wesely v. Pribyl's Estate, 195 Ill. App. 314.

work done but also includes the finished product, with reference to any reasonable and probable future use thereof.

3. **CONTRACTS, § 169***—*how contract for improvement construed.* Where a contractor as a guaranty of faithful performance of a contract to construct a wooden pavement in a street whereon a street railroad is maintained, agrees to maintain such pavement in a satisfactory condition for a term of years after completion without additional cost to contractee, it is unreasonable to require contractee to continue to use or cause to be used on such street the same type of cars used at the time the improvement was constructed, for the reason that the contract must be deemed to have been made with knowledge of and reference to the possibility that in the future a different and heavier type of cars might be used on such street, whose added weight might have such an effect on the soil of the street as to cause the pavement constructed by the contractor to sink and require repair under the contract.

4. **CONTRACTS, § 175***—*how contract for improvement construed.* A contract whereby a contractor agrees to construct an improvement, and as a guaranty of the faithful performance thereof further agrees to maintain the same in a satisfactory condition for a term of years after completion, without additional cost to contractee, and also agrees that contractee may retain a part of the contract price during such term to secure such performance, is not a contract to maintain a local improvement by special assessment, although contractee threatens if contractor fails to maintain the improvement as provided by the contract, contractee will cause the necessary repairs to be made and apply to the payment therefor the amounts retained under the contract.

In re Estate of Mae E. Pribyl, Deceased.

Charles E. Wesely, Claimant, Plaintiff in Error, v. Estate of Mae E. Pribyl, Defendant in Error.

Gen. No. 20,834.

1. **JUDGES, § 9***—*when interchange authorized.* Rev. St., ch. 37, sec. 245 (J. & A. ¶ 3294), authorizes judges of city courts to hold court for Circuit Court judges in Cook county.

2. **APPEAL AND ERROR, § 1718***—*when question of constitutionality of statute waived.* The Appellate Court cannot pass on the validity

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wesely v. Pribyl's Estate, 195 Ill. App. 314.

of a statute for the reason that in taking an appeal to that court instead of to the Supreme Court all constitutional questions are waived by appellant.

3. APPEAL AND ERROR, § 714*—*when placita sufficient*. Where a judge of a city court holds court for a judge of the Circuit Court, although it would have been well if the *placita* had stated that such judge of the city court had been requested to hold court in the Circuit Court, the *placita* is not fatal—defective in that it does not so state.

4. PARENT AND CHILD, § 45*—*when gift presumed*. Improvements made by a parent on the property of a child are presumed to be intended as a gift in the absence of evidence of a contract or promise of the child to pay for such improvement, or of a statement for such work rendered to her, or that an account had ever been kept between them with reference to the work.

Error to the Circuit Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 15, 1915.

Q. J. CHOTT and FRANK H. CULVER, for plaintiff in error.

BENJAMIN B. KAHANE and DANIEL P. TRUDE, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

A claim by Charles E. Wesely against the estate of Mae E. Pribyl, deceased, was dismissed by the Probate Court. Upon appeal to the Circuit Court a jury, as instructed by the court, found the issues for the defendant. Claimant seeks to have the judgment entered thereon reversed.

The trial judge was H. Sterling Pomeroy, a judge of the City Court of Kewanee, Henry county, Illinois, then sitting in the Circuit Court of Cook county, and the principal point urged by claimant is that Judge Pomeroy had no right to preside in the Circuit Court and to hear the case at bar.

Section 245 of chapter 37, Rev. St. (J. & A. ¶ 3294), clearly seems to authorize judges of city courts to hold

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wesely v. Pribyl's Estate, 195 Ill. App. 314.

court for Circuit Court judges in Cook county. The section reads as follows: .

“Such judges may, with like privileges as the judges of circuit and county courts, interchange with each other, and with the judges of circuit, superior, county and probate courts, and may hold court for each other, and for judges of circuit, superior, county and probate courts, and perform each other's duties, and the duties of judges of circuit, superior, county and probate courts, when they find it necessary or convenient.”

In *American Car & Foundry Co. v. Hill*, 226 Ill. 227, it was held that under this statute a judge of a city court was qualified to preside at the trial of a cause in the Circuit Court. See also, opinion in *White v. Herhold*, 182 Ill. App. 477, in which this identical question was involved.

We cannot pass upon the validity of the statute. *Case v. City of Sullivan*, 222 Ill. 56; *Rogers v. St. Louis-Carterville Coal Co.*, 254 Ill. 104.

It is not fatally defective that the *placita* did not recite that Judge Pomeroy had been requested to hold court in the Circuit Court. Upon a similar point the Supreme Court said in *Reitz v. People*, 77 Ill. 518: “It would have been well the *placita* should have stated, ‘holding the term by request of the judge of the 23rd judicial circuit,’ but the omission does not render the proceedings void.”

The claim is for labor and materials furnished by claimant in building a porch on the premises owned by Mae E. Pribyl, who was his daughter. Testimony was introduced tending to prove the value of the labor and materials. There was no evidence of any contract or promise by Mae E. Pribyl to pay her father, nor any proof that a statement for said work had ever been rendered to her, or that there had been any account with reference thereto kept between them. No claim therefor was made until nearly three years after the daughter had died.

Cole Motor Co. v. Centaur Motor Co. of Ill., 195 Ill. App. 317.

It was decided in *Maciejewska v. Jarzombek*, 243 Ill. 136, that improvements made by a parent on the property of a child are presumed to be intended as a gift. Hence it was not error for the court herein to instruct the jury to find against the claimant. The judgment is affirmed.

Affirmed.

Cole Motor Company, Appellee, v. Centaur Motor Company of Illinois, Appellant.

Gen. No. 20,946. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Cole Motor Company, a corporation, plaintiff, against the Centaur Motor Company of Illinois, a corporation, defendant, in the County Court of Cook county, to recover for the conversion of an automobile. From a judgment for plaintiff, defendant appeals.

MILLER, GORHAM & WALES, for appellant.

WALTER F. OLDS, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **INSTRUCTIONS, § 85***—*when instruction as to burden of proof improper.* In an action of trover to recover for the conversion of an automobile, where the conversion was by defendant's agent, an

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barth v. Farmers and Traders Bank, 195 Ill. App. 318.

instruction that the burden was on the defendant to show by a preponderance of evidence that in doing the acts constituting the conversion such agent was not acting for defendant is erroneous.

2. TROVER AND CONVERSION, § 47*—*what proper measure of damages.* In an action to recover damages for the conversion of an automobile, the measure of damages is the value of the automobile at the time of the conversion.

3. CHATTEL MORTGAGES, § 224*—*when purchaser of property charged with notice.* Where a chattel mortgage duly recorded provides that if the mortgagor sells or assigns the mortgaged property the mortgage debt shall at once become due and payable "without notice to any one," and that the mortgagee in such case at its option may take immediate possession of the mortgaged property, any person claiming title to the mortgaged property under the mortgagor is charged with notice of the provisions of the mortgage, and such person taking under the mortgagor is not entitled to notice if the mortgagee exercises its option.

4. TROVER AND CONVERSION, § 36*—*what sufficient to show conversion.* Where the facts relied upon to prove a conversion are that an agent of defendant negotiated a sale of the property converted, and where a second sale of such property took place the same day, it is unimportant whether the conversion took place at the first or second sale.

Fred Barth, Appellee, v. Farmers & Traders Bank, Appellant.

Gen. No. 20,949.

1. JUDGMENT, § 110*—*when entry by default improper.* It is error to enter a default after striking the affidavit of defense without first striking the pleas, proper practice requiring that where the affidavit filed with the plea is stricken, the plea shall be ordered stricken for want of the required affidavit before entering default.

2. CONFLICT OF LAWS, § 15*—*what law governs certificate of deposit.* A certificate of deposit, made in a foreign State by a bank of that State and payable to a payee in that State, is governed by the laws of such foreign State.

3. EVIDENCE, § 7*—*when courts do not take judicial notice of foreign law.* Where an affidavit of defense sets up a defense grounded on the law of a foreign State, where the contract was made and by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the law of which it is governed, it is error to strike the plea or to attempt, prior to the trial, to determine the fact of the law of such foreign State, as the courts do not take judicial notice of the laws of a foreign State, but such laws are questions of fact, to be proved as other facts are proved.

4. APPEAL AND ERROR, § 1034*—*when judicial notice not taken.* The same rule which prevents the trial court from determining the law of a foreign State before proof of such law is made will prevent the Appellate Court from determining such question on appeal from the decision of the trial court.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

This is an action to recover upon a certificate of deposit issued by the defendant to the Columbia Casualty Company in the sum of \$2,500.

The first count of the declaration declares specially upon the certificate of deposit, the second on the common counts. To the declaration was attached an affidavit showing the nature of plaintiff's demand and the amount due him. Defendant filed a plea of nonassumpsit and several special pleas together with an affidavit of defense. By order of the court this affidavit of defense was stricken from the files for insufficiency and leave granted to file an amended affidavit. Subsequently an amended affidavit of defense was filed specifying the nature of the defense, which by order of court was stricken from the files and default entered against defendant for want of an affidavit of defense. Dam-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Barth v. Farmers and Traders Bank, 195 Ill. App. 318.

ages were assessed by the court in the sum of \$2,564.17, and judgment entered against the defendant for that amount.

Default of the defendant should not have been entered without first striking the pleas from the files.

Kearney v. County of Cook, 187 Ill. App. 435; *McDonnell v. Harter*, 22 Ill. 28; *Filkins v. Byrne*, 72 Ill. 101; *New York Nat. Exch. Bank v. Reed*, 232 Ill. 123; *Cramer v. Illinois Commercial Men's Ass'n*, 260 Ill. 516. The proper practice, where the affidavit filed with the plea is stricken from the files, is to order the plea stricken for want of the required affidavit. After this is done it is proper to enter an order of default.

Defendant by its amended affidavit specifies as defenses, among other things, that the certificate sued on is governed by the laws of Indiana; that it is non-negotiable as an inland bill of exchange under the laws of Indiana because it is not payable in a bank in Indiana, not payable at a definite and certain time, and is payable in current funds and not in money; that the certificate is assignable by indorsement under the statute of Indiana, and on such transfer successive purchasers took subject to defenses and equities; that it was *ultra vires* the Columbia Casualty Company to invest its funds in certificates of deposit under the statute of Indiana under which it was organized, and that it was without authority to indorse, discount and deal in same. It is not necessary for the purposes of this opinion to note the other matters of defense appearing in the affidavit.

The certificate of deposit sued on was made in Indiana by a bank of that State, payable to an Indiana corporation in the State of Indiana, and is therefore governed by the laws of that State. There seems to be no controversy as to this proposition. *Evans v. Anderson*, 78 Ill. 558; *Walker v. Lovitt*, 250 Ill. 543.

If the law of Indiana was as claimed by defendant, an adequate defense was presented and defendant was

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entitled to go to trial upon the question of fact as to the law of that State. The trial court apparently being of the opinion, after examinations of decisions, that the Indiana law was not as claimed in the affidavit of defense, struck it from the files. In so doing the court committed reversible error. What the law of another State is on a given subject is a question of fact, to be proved as other facts are proved. *Milwaukee & St. P. Ry. Co. v. Smith*, 74 Ill. 197; *Louisville, N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617. In volume 13 Amer. & Eng. Encyc. of Law, page 1058, appears the statement: "It is well settled that the courts of the several States do not take judicial notice of the laws of the other States of the Union, but such laws are matters of fact and must be proved as other facts by introducing evidence thereof." This statement is supported by a very large number of citations of cases from almost every State. See also 46 L. R. A. (N. S.) footnotes 176, also footnotes in 25 L. R. A. 449. In *Marshall v. Coleman*, 187 Ill. 556, 582, the court said: "The laws of foreign countries or other States are facts."

It was just as erroneous for the court to attempt to ascertain the fact as to the Indiana law before evidence thereof was introduced as it would have been to have attempted to determine any other fact set out in the affidavit of merits before evidence of such fact was before the court.

The same rule which inhibits the trial court from determining the law of another State before such law has been introduced in evidence, likewise prevents this court from passing upon the question as to what the law of Indiana is, although this is argued at length by respective counsel. It would be inconsistent with our holding, as above stated, for us to do so.

For the error indicated the judgment is reversed and the cause remanded for trial.

Reversed and remanded.

Schupp v. State Bank of Monticello, 195 Ill. App. 322.

Robert W. Schupp, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,954. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Action by Robert W. Schupp, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank, ante, p. 318*, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case also occurred in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Robert W. Schupp, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,963. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Schupp v. State Bank of Monticello, 195 Ill. App. 823.

Statement of the Case.

Action by Robert W. Schupp, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case also occurred in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Robert W. Schupp, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,992. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by Robert W. Schupp, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

Missouri State Life Ins. Co. v. State Bank of Monticello, 195 Ill. App. 324.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case also occurred in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Missouri State Life Insurance Company, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,993. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Missouri State Life Insurance Company, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an

Missouri State Life Ins. Co. v. State Bank of Monticello, 195 Ill. App. 325.

opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case also occurred in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Missouri State Life Insurance Company, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,995. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Missouri State Life Insurance Company, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

Missouri State Life Ins. Co. v. State Bank of Monticello, 195 Ill. App. 326.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Missouri State Life Insurance Company, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,997. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Missouri State Life Insurance Company, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

Missouri State Life Ins. Co. v. State Bank of Monticello, 195 Ill. App. 327.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Missouri State Life Insurance Company, Appellee, v. State Bank of Monticello, Appellant.

Gen. No. 20,999. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Missouri State Life Insurance Company, plaintiff, against the State Bank of Monticello, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this case, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Missouri State Life Ins. Co. v. Central Bank, 195 Ill. App. 328.

**Missouri State Life Insurance Company, Appellee, v.
Central Bank, Appellant.**

Gen. No. 20,994. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by the Missouri State Life Insurance Company, plaintiff, against the Central Bank, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Phil E. Davant, Appellee, v. Central Bank, Appellant.

Gen. No. 20,996. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October

Treadwell v. Central Bank, 195 Ill. App. 329.

term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by Phil E. Davant, plaintiff, against the Central Bank, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Charles A. Treadwell, Appellee, v. Central Bank, Appellant.

Gen. No. 20,998. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Long v. Central Bank, 195 Ill. App. 330.

Statement of the Case.

Action by Charles A. Treadwell, plaintiff, against the Central Bank, defendant, in the Superior Court of Cook county.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

**William H. Long, Appellee, v. Central Bank,
Appellant.**

Gen. No. 21,000. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by William H. Long, plaintiff, against the Central Bank, defendant, in the Superior Court of Cook county.

Quirk v. McDonnell, 195 Ill. App. 331.

The facts in the above entitled case, with unimportant differences, are similar to those set forth in *Barth v. Farmers & Traders Bank*, ante, p. 318, in which an opinion was filed the same day, and present the same questions. The proceeding held to be reversible error in that case occurred also in this, and the reason for reversing and remanding in that case is applicable to this case.

JAMES BINGHAM and CASTLE, WILLIAMS, LONG & CASTLE, for appellant.

ADAMS, FOLLANSBEE, HAWLEY & SHOREY, for appellee; MITCHELL D. FOLLANSBEE, CLYDE E. SHOREY and JOHN E. GAVIN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

James F. Quirk, Defendant in Error, v. Joseph S. McDonnell, Plaintiff in Error.

Gen. No. 21,056. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15 1915.

Statement of the Case.

Action by James F. Quirk, plaintiff, against Joseph S. McDonnell, defendant, in the Municipal Court of Chicago, to recover back money paid under an agreement to sell real estate on the ground of default by the defendant in performance of such agreement. The material parts of the agreement are as follows:

“That if the party of the second part shall first make the payments and perform the covenants herein-

Quirk v. McDonnell, 195 Ill. App. 331.

after mentioned on his part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part, in fee simple, clear of all incumbrances whatever by a good and sufficient warranty deed, the lot, piece or parcel of ground situated in the County of Cook and State of Illinois, known and described as Lot 10 in Block 6 in Tolman & Tondelius subdn. of Lot 3, otherwise known as number 3949 S. Artesian avenue, and the said party of the second part hereby covenants and agrees to pay to the said party of the first part the sum of Fourteen Hundred and 00/100 Dollars in the manner following: Three Hundred Dollars on the signing of this agreement and assume a One Hundred to Seven Hundred Dollar mortgage or trust deed to be secured against the property due in about three to five years and the balance of the purchase price at not less than Fifteen Dollars per month, payable monthly in advance on the fifteenth day of each month at the office of J. McDonnell, Chicago, Illinois, with interest at the rate of six (6%) per centum per annum, payable semi-annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, fire insurance assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year 1913. And in case of the failure of the said party of the second part to make either of the payments, or any part thereof, or perform any of the covenants on his part hereby made and entered into, this contract shall at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by him on this contract, and such payments shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid.

Quirk v. McDonnell, 195 Ill. App. 331.

“In consideration of the premises herein mentioned the said J. McDonnell agrees to make the following repairs: Straighten and side the basement, build two new stairways, one in front and one in rear, fix water pipe in basement, build 2½-foot cement walk from lot line in front to rear steps.”

To reverse a judgment for plaintiff for Three Hundred Dollars, defendant prosecutes this writ of error.

FRANCIS A. McDONNELL, for plaintiff in error.

LITZINGER, MCGURN & REID, for defendant in error;
LEONARD C. REID, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 333***—*when evidence inadmissible in action to recover back purchase price payments.* Where by the provisions of an agreement to sell real estate it appears that vendor will not be required to make conveyance for a period of more than two years, testimony as to the reasonableness of or the time taken by vendor to perfect his title is irrelevant.

2. **VENDOR AND PURCHASER, § 164***—*when purchaser to have possession.* An agreement to sell real estate wherein it is provided that vendor shall make certain repairs, and that vendee shall pay taxes and other assessments before conveyance, evidences an intention of the parties that vendee shall have possession of the premises before such conveyance.

3. **VENDOR AND PURCHASER, § 164***—*when possession to be given in reasonable time.* Where an agreement to sell real estate shows an intention of the parties that vendee shall have possession before conveyance, and the agreement fixes no definite time when such possession is to be delivered to vendee, the law implies that such possession shall be delivered within a reasonable time.

4. **VENDOR AND PURCHASER, § 164***—*where parol agreement as to delivery of possession valid.* Where an agreement to sell real estate requires that possession be delivered to vendee before conveyance but fixes no time for such delivery, the parties may validly make a parol contract as to what shall be deemed such reasonable time.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Doe, 195 Ill. App. 334.

5. EVIDENCE, § 350*—*when parol evidence of collateral agreement admissible.* Where an agreement to sell real estate requires that possession be delivered to vendee before conveyance, but fixes no time for such delivery, parol evidence of a contract fixing such time for delivery is competent, and has no tendency to vary the terms of a written instrument.

6. VENDOR AND PURCHASER, § 164*—*when delay in delivery of possession unreasonable.* Where an agreement for the sale of real estate dated March 25th gave vendor a period of more than two years in which to make conveyance, but was construed to require delivery of possession to vendee within a reasonable time, and where there was evidence of a verbal agreement to deliver such possession April 15th, a finding that vendor unreasonably delayed to deliver such possession *held* warranted by the evidence, where it appeared that as late as May 18th such possession had not been delivered, although there was evidence that at such last mentioned date vendor had not perfected his title, for the reason that under the agreement the time for conveyance and the time for delivery of possession were not the same, and therefore failure to perfect title did not excuse vendor for unreasonable delay in delivering possession to vendee.

**City of Chicago, Defendant in Error, v. Jane Doe,
alias Mrs. Mary Metz, Plaintiff in Error.**

Gen. No. 21,093. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915.

Statement of the Case.

Prosecution by the City of Chicago against Jane Doe, *alias* Mrs. Mary Metz, in the Municipal Court of Chicago, charging defendant with being the keeper of a disorderly house in violation of section 2019 of the Chicago Code. To reverse a judgment of conviction, defendant prosecutes this writ of error.

CHARLES HORGAN, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Conlon v. Trenkhorst, 195 Ill. App. 335.

RICHARD S. FOLSOM and HARRY B. MILLER, for defendant in error; JOHN F. POWER, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **DISORDERLY HOUSE, § 1***—*when evidence sufficient to support judgment.* In a prosecution charging defendant with being the keeper of a disorderly house in violation of section 2019 of the Chicago Code, evidence *held* sufficient to prove that the character of the house was within the language of the ordinance.

2. **DISORDERLY HOUSE, § 2***—*when evidence sufficient to show keeping.* In a prosecution wherein defendant was charged with being the keeper of a disorderly house in violation of section 2019 of the Chicago Code, evidence *held* sufficient to sustain a judgment of conviction.

M. C. Conlon, Defendant in Error, v. Frank Trenkhorst, Plaintiff in Error.

Gen. No. 21,128. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915.

Statement of the Case.

Action of tort by M. C. Conlon, plaintiff, against Frank Trenkhorst, defendant, in the Municipal Court of Chicago, to recover for injuries to plaintiff's electric car caused by being struck by defendant's automobile, alleged to have been negligently operated. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

ANDREW J. REDMOND, for plaintiff in error.

EBEN F. RUNYAN, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. La Salle St. Trust & Sav. Bank, et al., 195 Ill. App. 336.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. AUTOMOBILES AND GARAGES, § 2*—*when evidence sufficient to show negligence.* In an action of tort to recover for injuries to plaintiff's electric car by being struck by a 60-horsepower automobile weighing 5,000 pounds, alleged to have been negligently operated by defendant, where it appeared that defendant, going south at a rate of speed estimated at from twenty-five to thirty miles an hour, turned west at a speed of fifteen miles an hour, veering towards the south side of the street into which he turned, so as to strike plaintiff's electric car which was running east on the same street, evidence held to warrant a finding that defendant was negligent, although he claimed the accident was due to his attempt to avoid striking children who were on the cross walk as he turned, as the evidence warranted the court in finding that the cause of the accident was defendant's excessive speed.

2. DAMAGES, § 151*—*when verdict for injury to automobile not excessive.* In an action of tort to recover for damages to plaintiff's electric car due to defendant's negligent operation of an automobile, a finding of \$247.25 for plaintiff held not excessive under the evidence.

The People of the State of Illinois ex rel. James J. Brady, Auditor, v. La Salle Street Trust & Savings Bank et al.

William C. Niblack, Receiver, Appellee, v. John A. Cervenka, Respondent, Appellant.

Gen. No. 21,729.

1. BANKS AND BANKING, § 23*—*how provision for distribution of proceeds of stockholders' liability construed.* That portion of section 11 of the Banking Act (J. & A. ¶ 683) providing that the amounts collected by the receiver of an insolvent banking corporation from the stockholders thereof shall be disbursed in the same manner in which its assets are distributed, is not necessarily an attempt to limit the rights of creditors as against stockholders since, while both assets

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and amounts collected from stockholders are to be distributed among creditors as their interests may appear, it does not follow that such distribution shall be necessarily pro rata.

2. **STATUTES, § 38***—*what effect of partial invalidity.* Even though that part of section 11 of the Banking Act (J. & A. § 683) which provides for the distribution to creditors of the amounts collected by the receiver of an insolvent banking corporation from the stockholders thereof be unconstitutional as an attempt to limit the rights of such creditors as against such stockholders to a pro rata portion of the amounts collected from such stockholders, yet the balance of such section is not thereby rendered invalid, as it is complete and can be given full force and effect.

3. **BANKS AND BANKING, § 23***—*when order to receiver to enforce stockholders' liability proper.* On a bill by the receiver of an insolvent banking corporation, filed under section 11 of the Banking Act (J. & A. § 683), for the purpose of securing a dissolution of the corporation, a decree entered after a hearing directing such receiver, among other things, to enforce the liability of stockholders to the corporation, if there be any such liability, is not erroneous, as such section provides that in such case such receiver shall "enforce the liability of stockholders to creditors as provided in section 6 (J. & A. § 678) of this Act," which section is identical in its terms with section 6 of article XI of the Constitution of 1870.

4. **BANKS AND BANKING, § 28***—*when creditor restrained from enforcing stockholders' liability.* A petition by the receiver of an insolvent banking corporation to restrain a creditor from prosecuting actions to obtain an unjust and inequitable advantage over other creditors is not prematurely brought, where it appears that at the time the bill was filed there was a necessity of enforcing the liabilities of such stockholders on behalf of all the creditors, and where it further appears that it will be impracticable for such receiver to enforce such liability prior to the time when such creditor, unless restrained, will be able to prosecute such suits to judgment and to obtain satisfaction thereof.

5. **INJUNCTION, § 332***—*when bond not essential.* Where a court which has assumed jurisdiction of the entire matter of the affairs of an insolvent banking corporation restrains a creditor from receiving an undue advantage over other creditors, no bond is necessary.

6. **ESTOPPEL, § 71***—*when creditor cannot maintain suit on stockholders' liability.* Where a receiver of an insolvent banking corporation has been duly appointed and a creditor has filed his claim with such receiver, and indicated a willingness to submit all matters connected with his claim to the court, he is precluded from taking any steps which will interfere with the power of the court to adjudicate

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such claim, for the reason that a creditor cannot claim the benefit of a portion of a decree and at the same time adopt a course calculated to deprive other persons similarly situated of another portion of its benefits.

Interlocutory appeal from the Circuit Court of Cook county; the Hon. FREDERICK A. SMITH, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed November 15, 1915.

VINCENT D. WYMAN, CHARLES E. CARPENTER and OTTO W. JURGENS, for appellant.

H. T. GILBERT, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

By this appeal John A. Cervenka, appellant, seeks to have reversed an order enjoining him, until the further order of the court, from prosecuting suits against stockholders of the La Salle Street Trust & Savings Bank based on stockholders' liability.

The record in the case shows that a bill was filed in conformity with section 11 of the Banking Act (J. & A. ¶ 683) by the People of the State of Illinois on the relation of James J. Brady, Auditor, against the La Salle Street Trust & Savings Bank and its stockholders, for the purpose of securing a dissolution of the corporation, a winding up of its affairs, and a distribution of its assets among its creditors, or creditors and stockholders, and, if necessary, the enforcement of the liability of its stockholders to its creditors. Upon the filing of that bill the court appointed William C. Niblack, appellee herein, as receiver of said bank. Subsequently a hearing was had and a decree entered dissolving the corporation, providing for the conversion of its assets into money, publication of notice to creditors to present their claims, and for such other proceedings as the court might find necessary for the administration of the assets of the corporation and a complete winding up of its affairs, including the enforcement of the liabilities, if any, of stockholders to the creditors.

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After the entry of this decree appellant filed with the receiver his claim against the bank for \$17,742.98. Prior to the entry of the decree of dissolution, appellant commenced his suit as a creditor of the bank against John F. Jelke, a stockholder at the time the bank suspended business, to enforce the latter's stockholder's liability; and after the entry of the decree of dissolution and after he had filed his claim with the receiver, appellant commenced actions against Edward Shearson *et al.*, John Burnham & Company and Frederick M. Zeiler *et al.*, to enforce their respective liabilities as stockholders on account of stock previously held by them but disposed of prior to the suspension of the bank and the appointment of the receiver.

The record shows that the assets of the bank are insufficient to the extent of over \$1,500,000 to satisfy its liabilities to its creditors. It also shows that the receiver will, as soon as practicable, apply to the court to ascertain that the assets of the Trust & Savings Bank are insufficient to discharge its entire liability to its creditors and to determine the amount of the deficiency, and thereupon to direct the receiver to proceed to enforce the liabilities of the stockholders of the bank to its creditors, but that it will be impracticable for him to procure such order prior to the time when appellant will be able to prosecute his suits to judgments. It is represented that if appellant is permitted to prosecute his suits to judgments and to obtain satisfaction thereof he will thereby secure an unjust and inequitable advantage over the other creditors of the bank in the satisfaction of their claims against it.

Upon the above showing being made, the court entered its restraining order against appellant.

It is said that so much of section 11 of the Banking Act (J. & A. ¶ 683) as authorizes a receiver appointed thereunder to proceed to collect stockholders' liability is unconstitutional.

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Section 6, art. XI, of the Constitution of 1870 is as follows:

“Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.”

The Banking Act in force June 16, 1887, sec. 6, sought to make each stockholder liable only for his ratable share and no more, but in *Dupee v. Swigert*, 127 Ill. 494, it was held that such legislation was in conflict with the above section of the Constitution which, as stated in the opinion, made every stockholder liable for the debts of the bank to an amount equal to twice the amount of the stock held by him, leaving the question of contribution to be settled among the stockholders themselves.

Section 11 of chapter 16a of the present Banking Act (J. & A. ¶ 683) contains the following provision:

“When it shall be ascertained, in the course of the administration of the estate of a bank in the hands of a receiver that the assets of the bank are insufficient to discharge the entire liability of such bank to its creditors, and when the amount of such deficiency is determined, the court may, in its discretion, direct the receiver to proceed to enforce the liability of the stockholders to creditors provided in section 6 of this Act; and when so directed, such receiver shall have the power, and it shall be his duty, to take such action, by suit or otherwise, as the court may direct, to enforce such liability for the benefit of the creditors and to disburse to creditors the amounts collected thereon, in the same manner as disbursements are made to creditors of the assets of the bank.”

It is argued that as the Act of 1887 attempted to limit the liability of stockholders to a pro rata share of the bank's debts, so this section 11—and especially the provision that such disbursements are to be made in the same manner as the assets—undertakes to limit

The People v. La Salle St. Trust & Sav. Bank, et al., 195 Ill. App. 336.

the right of creditors as against stockholders to a pro rata share of the claims against the stockholders. It is a sufficient answer to say that it does not follow that under the provision for disbursements to creditors the amounts collected from stockholders shall be distributed pro rata among creditors. Both the assets of the bank and amounts collected from stockholders will be distributed among the creditors as their interests may appear. Furthermore, even should the clause of this act concerning distribution of amounts collected from stockholders be unconstitutional, the entire section would not be invalid as the remaining part is complete and can be given full force and effect.

It is to be noted that section 11 provides that the receiver shall proceed "to enforce the liability of the stockholders to creditors provided in section 6 of this Act," and section 6 (J. & A. ¶ 678) referred to is identical in its terms with section 6, art. XI of this Constitution; so that the order to the receiver in this case to proceed against stockholders is in complete accord with the constitutional provision.

The petition for an injunction was not premature. The receiver's petition avers that the assets are insufficient to satisfy the liabilities by over \$1,500,000, which is \$500,000 in excess of the par value of the bank's entire capital stock. This allegation, for the purposes of this appeal, must be taken as true, and, therefore, the necessity of enforcing the liabilities of stockholders is established.

There is no merit in the point that the receiver has not been duly diligent.

No bond is necessary when a court having assumed jurisdiction of the entire matter restrains a creditor from receiving an undue advantage over other creditors.

There is much force in the point made by appellee that when appellant filed his claim with the receiver he indicated his willingness to submit the entire matter

Krakis et al. v. Hooper, 195 Ill. App. 342.

of the administration of the bank's assets and the winding up of its affairs, including the enforcement of stockholders' liability, to the court, and, therefore, he is precluded from taking any steps which would interfere with the exercise by the court of its power to do anything necessary to accomplish this purpose. He cannot claim the benefits of a portion of the decree while at the same time adopting a course calculated to deprive other persons similarly situated of another portion of its benefits. The interlocutory order is affirmed.

Affirmed.

Pete Krakis et al., Defendants in Error, v. James H. Hooper, Plaintiff in Error.

Gen. No. 20,488. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915.

Statement of the Case.

Action by Pete Krakis and others, plaintiffs, against James H. Hooper, defendant, in the Municipal Court of Chicago, to recover on a verbal agreement for the installation of a sewer, catch basin and water-closet in a building of defendant. To reverse a judgment of one hundred dollars for plaintiffs, defendant prosecutes this writ of error.

JAMES H. HOOPER, *pro se*.

No appearance for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court.

McGivern v. Parkhill, 195 Ill. App. 343.

Abstract of the Decision.

ASSUMPSIT, ACTION OF, § 89*—when finding sustained. In an action to recover on a verbal contract to install a sewer, catch basin and water-closet in defendant's building, where the evidence was conflicting, evidence *held* to sustain a finding of one hundred dollars for plaintiffs.

Thomas McGivern, Defendant in Error, v. Elizabeth Parkhill, Plaintiff in Error.

Gen. No. 20,826. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915. Rehearing denied November 29, 1915.

Statement of the Case.

Action of forcible detainer by Thomas McGivern, plaintiff, against Elizabeth Parkhill, defendant, in the Municipal Court of Chicago. To reverse a judgment for plaintiff, defendant prosecutes this writ of error. The facts, so far as material, are as follows:

Defendant was in possession of the premises in question under a written lease, executed by plaintiff and by her, for one year ending April 30, 1914. She testified that in March or April of that year defendant asked her if she wanted to stay another year, and she said yes, she wanted a lease for three years; that plaintiff said that he did not want to make a lease for more than one year, but then said, "I will give you a two years' lease," and that she said, "All right"; that defendant delivered to her May 1st duplicate instruments in writing in the form of leases of the premises for two years, in the body of which plaintiff is named

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McGivern v. Parkhill, 195 Ill. App. 343.

as lessor and defendant and her husband, H. J. Parkhill, as lessees, which instruments had not been signed by any one; that she and her husband signed said instruments about a week after May 1st; that she kept said instruments in her possession and did not tell plaintiff that she or her husband had signed the same until July 28th, when plaintiff served her with a notice in writing that he had elected to terminate her lease of the premises, her lease and tenancy to terminate August 31st, and notifying her to surrender possession of the premises to him at the close of that day; that she then said to plaintiff, "You can have your leases; they have been signed." She gave as a reason for not informing plaintiff that the instruments were signed and returning the same to him, that she was waiting to see what he would do about dividing the store, and admitted that the dividing of the store and the leasing to her of one-half of it was discussed between her and plaintiff after May 1st.

JOHN M. GRIMES, for plaintiff in error.

W. A. MORROW, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1174*—*how direction of verdict reviewed.* In deciding the question as to whether there was error in the direction of a verdict by a trial court, the evidence most favorable to the party against whom the verdict is directed must be taken as true, and the inferences to be drawn therefrom, while they must be such as may be fairly made, must also be such as are most favorable to such party.

2. LANDLORD AND TENANT, § 41*—*when lease not accepted.* In an action of forcible detainer, where it appeared that defendant received two copies of a proposed lease unsigned by lessor, and where although defendant signed them, she did not notify plaintiff or return the leases, and where it appeared that after the date of the leases she

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McGivern v. Parkhill, 195 Ill. App. 343.

conversed with plaintiff about a proposed lease which was different from that which she signed and retained, *held* that such conversation tends to show that defendant did not regard the leases signed as binding on her.

3. LANDLORD AND TENANT, § 41*—*when unsigned lease not binding.* Leases not signed by lessor but delivered to and signed by lessee are not within the rule that where a lease contains mutual covenants and is executed by lessor only and accepted by lessee such lease is binding on the lessee.

4. LANDLORD AND TENANT, § 89*—*what is status of tenant holding over under void lease.* A verbal agreement for a lease is void under the statute, and tenant holding over under such an agreement becomes a tenant from month to month.

5. FRAUD, STATUTE OF, § 96*—*when part performance ineffective.* At law part performance does not take a contract out of the Statute of Frauds.

6. LANDLORD AND TENANT, § 39*—*when transaction mere revocable offer to lease.* Where a lessor sends to lessee copies of a proposed lease not executed by himself, which the lessee signs and retains without notifying the lessor of her acceptance of the lease, the facts show no more than an offer on the part of lessor to make a lease; and where it appears that the lessor, prior to notice of the lessee's acceptance of the lease, gave defendant notice to quit, such notice in legal effect amounts to a withdrawal of the offer.

7. LANDLORD AND TENANT, § 41*—*when lease not accepted by lessee.* Where a lessor sends to a lessee copies of a proposed lease which the lessee signs and retains without notifying the lessor, pending action of the lessor on a request for a lease containing different terms, there was no valid acceptance of the proposed lease so as to bind the lessor, as the lessee's assent thereto was merely mental.

8. LANDLORD AND TENANT, § 41*—*When lease not accepted, within reasonable time.* Where a lessor sends to a lessee copies of a proposed lease which was dated May 1st, and the lessee did not notify the lessor of her acceptance of such lease until July 28th, *held* that the acceptance was not made within a reasonable time.

9. CONTRACTS, § 40*—*what is effect of failure to accept promptly.* Where an offer to make a contract is not accepted within a reasonable time, the offerer may regard the offer as rejected.

10. FORCIBLE ENTRY AND DETAINER, § 50*—*who not a necessary party.* In an action of forcible detainer, where the contract was verbal and between plaintiff and defendant alone, a judgment for plaintiff *held* not erroneous in that defendant's husband was not joined as party defendant, where it did not appear that the husband was ever in possession of the premises of which possession is sought.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Brien v. O'Brien et al., 195 Ill. App. 346.

Emma M. O'Brien, Defendant in Error, v. Thomas F. O'Brien and Charlotte O'Brien, Plaintiffs in Error.**Gen. No. 20,838.**

1. **FORCIBLE ENTRY AND DETAINER, § 25***—*when equitable defense not considered.* An action of forcible detainer is an action at law, and an equitable defense cannot be set up to such an action.

2. **TRIAL, § 33***—*when postponement pending determination of injunction suit properly denied.* A motion in an action at law to postpone the trial pending the determination of a proceeding in chancery, *held* properly denied where it appeared that defendant had filed a bill praying for an injunction to restrain the prosecution of such action on purely equitable grounds, but where such injunction had not been obtained when the motion was made; for the reason that the mere fact that a bill had been filed to restrain the prosecution of an action at law does not of itself, without a restraining order, entitle a defendant to a continuance of the action at law, nor will the court of law postpone trial of the action to await action of the court of chancery on the bill for an injunction.

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 15, 1915.

JOHN S. DORNBLASER, for plaintiffs in error.

ALDEN, LATHAM & YOUNG, for defendant in error;
CHARLES MARTIN, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment of the Municipal Court for the plaintiff in an action of forcible entry and detainer.

The evidence shows that plaintiff had a legal title to the premises in question and was rightfully in possession until the defendant, Thomas F. O'Brien, without her consent took possession of a portion thereof. He filed a bill in chancery to have a trust in the premises declared and for an order restraining the prosecution of the forcible detainer suit, but procured no restraining order in the chancery suit. Defendant moved in the Municipal Court to postpone the trial

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Moon et al. v. Kinzer Construction Co., 195 Ill. App. 347.

until the motion for an injunction was disposed of, and contends here that the court erred in denying his motion. The grounds of relief alleged in the bill were equitable and cognizable only in a court of chancery. An action in forcible detainer is an action at law and an equitable defense cannot be set up in such action. A court of law will not postpone the trial of a cause to await the decision of a court of chancery on a motion for an injunction to restrain the prosecution of the action. If defendant has an equitable defense, he must obtain an injunction from the court of chancery to restrain the prosecution of the action; but the mere filing of a bill does not entitle such a defendant to a continuance of the common-law action.

The other grounds of defense urged are without merit. The court properly gave judgment for the plaintiff and the judgment is affirmed.

Affirmed.

Clarence D. Moon et al., Appellees, v. Kinzer Construction Company, Appellant.

Gen. No. 20,974. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the October term, 1914. Reversed with finding of fact. Opinion filed November 15, 1915. Rehearing denied November 29, 1915.

Statement of the Case.

Action by Clarence D. Moon and others, plaintiffs, against the Kinzer Construction Company, a corporation, defendant, in the Superior Court of Cook county, to recover on an alleged verbal contract to pay for hauling material. From a judgment for plaintiffs for \$7,646.87, defendant appeals.

JOHN A. BLOOMINGSTON, for appellant.

Schulze v. Parrish, 195 Ill. App. 348.

BUELL & ABBEY and FRED W. BENTLEY, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

ASSUMPSIT, ACTION OF, § 89*—*when evidence insufficient to show contract.* In an action to recover on an alleged verbal contract to pay for hauling material, evidence examined and *held* insufficient to prove the contract alleged.

T. W. Schulze, trading as T. W. Schulze & Company,
Defendant in Error, v. J. S. Parrish, Plaintiff in
Error.

Gen. No. 21,052. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed November 15, 1915.

Statement of the Case.

Action by T. W. Schulze, trading as T. W. Schulze & Company, plaintiff, against J. S. Parrish, defendant, in the Municipal Court of Chicago, to recover broker's commissions for negotiating an exchange of real estate of defendant for other real estate owned by a third person. To reverse a judgment for plaintiff for \$92.50, defendant prosecutes this writ of error.

MARTIN L. WILBORN, for plaintiff in error; JOHN W. SUTTON, of counsel.

No appearance for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Smith, 195 Ill. App. 349.

Abstract of the Decision.

BROKERS, § 71*—*when judgment for plaintiff improper.* In an action to recover broker's commissions for negotiating an exchange of real estate, where the affidavit of claim is for "the usual, ordinary and customary brokerage commission," but where the evidence for plaintiff showed that there was a special agreement as to the rate of commission to be paid plaintiff by defendant, *held* error to stop defendant in his testimony and to refuse to allow him to continue or to hear his other witnesses and to announce a finding and judgment, where defendant testified that the agreement was that defendant should not be liable for plaintiff's commissions but should obtain them from the other party to the exchange.

City of Chicago, Defendant in Error, v. Joseph Smith, Plaintiff in Error.

Gen. No. 21,111. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRANK H. GRAHAM, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915.

Statement of the Case.

Prosecution by the City of Chicago against Joseph Smith, defendant, in the Municipal Court of Chicago, charging defendant with a violation of section 2012 of the Revised Municipal Code of Chicago. To reverse a judgment of conviction and the assessment of a fine of two hundred dollars against defendant, defendant prosecutes this writ of error.

A. L. WILLIAMS, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Paulin v. Paulin, 195 Ill. App. 350.

Abstract of the Decision.

1. **CRIMINAL LAW, § 39***—*what is effect of appearance.* Where, defendant in a criminal case appears and submits the case to the court, the only question is whether defendant is guilty as charged, and in such case the facts relating to his arrest are immaterial.

2. **MUNICIPAL CORPORATION, § 863***—*when complaint for violating ordinance states single offense.* A complaint under section 2012 of the Revised Municipal Code of Chicago, charging a violation of the ordinance, in that defendant "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace," charges a single offense only, and is not a blanket complaint.

Mabel Frances Paulin, Defendant in Error, v. William A. Paulin, Plaintiff in Error.

Gen. No. 19,646.

1. **DIVORCE, § 106***—*when alimony decree final.* Although a decree for alimony may be varied by the court which renders it, yet where such a decree divorces the parties, decrees alimony and settles the question of the custody of a child of the marriage, it is final until changed by the court rendering it, and final as to every other court.

2. **DIVORCE, § 133***—*when foreign alimony decree enforceable.* A decree for alimony rendered by the courts of a foreign State is within the application of the full faith and credit clause of the Constitution of the United States, which confers jurisdiction to enforce such decree upon the courts of the States other than that by whose courts the decree was rendered, provided the decree sought so to be enforced is final and not temporary in its nature.

3. **DIVORCE, § 132***—*when action lies on alimony decree.* Where a decree for alimony finds a sum of money to be due and orders it to be paid absolutely and at all events, and not upon any contingency, such sum becomes by the force of the decree a debt, liquidated, fixed and certain, and completely within the rules which permits actions at law to be brought on decrees, notwithstanding the fact that the decree relied on may order things other than the payment of money to be done.

4. **DIVORCE, § 132***—*when Municipal Court has jurisdiction over action on alimony decree.* An action to recover money found to be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Paulin v. Paulin, 195 Ill. App. 350.

due by a decree for alimony is a civil action, and within the jurisdiction of the Municipal Court of Chicago as a fourth-class action.

5. MUNICIPAL COURT OF CHICAGO, § 13*—*when affidavit of defense properly stricken*. Where an affidavit of defense alleges no facts which, if proven, would have constituted a meritorious defense to the action, it is not error to strike the affidavit, and assess plaintiff's damages.

6. RECORDS, § 7*—*when clerk's minutes sufficient*. It is not necessary that the minutes of the clerk of a court should contain all the essentials of a judgment, or that such minutes should consist of English words written out at length, and be clearly intelligible to every person acquainted with the English language, but it is sufficient if their meaning is apparent to the officers of a particular court, for the reason that such minutes are intended for the information of such officers alone and not for the information of persons generally.

7. JUDGMENT, § 238*—*when default properly entered nunc pro tunc*. An entry of notation of default *nunc pro tunc* is proper where such notation appears from the clerk's minute book to have been properly directed when the judgment was ordered, but which by the clerk's error was omitted in making up the record, for the reason that such entry adds nothing to the judgment as originally directed but merely corrects an error of the clerk in failing to transcribe the notation.

8. EVIDENCE, § 4*—*when clerk's minutes judicially noticed*. The minute book of the clerk of a court is part of the archives of the court of which the judges thereof may properly take judicial notice.

9. APPEAL AND ERROR, § 1472*—*when admission of evidence harmless*. While evidence of clerks as to the minute book of the clerk of a court was unnecessary, yet *held* not prejudicial error to admit it.

Error to the Municipal Court of Chicago; the Hon. HUGH R. STEWART, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915.

ROSENTHAL & KURZ, for plaintiff in error.

JOSHUA R. H. POTTS, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Plaintiff sued the defendant for money due and unpaid for alimony decreed plaintiff in a divorce action between the parties to this cause, lately pending in the Court of Insolvency of Hamilton County in the State

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Paulin v. Paulin, 195 Ill. App. 350.

of Ohio. The decree also severed the matrimonial bond. The final seven instalments due by the divorce decree, with interest from the dates they were respectively due, together amount to the sum of \$747, for which plaintiff obtained judgment.

Defendant's affidavit of defense was on motion of plaintiff stricken from the files, and the court assessed plaintiff's damages and gave judgment against defendant for the amount of the claim. Defendant brings the record here for review and assigns errors which in their essence attack the jurisdiction of the Municipal Court to take cognizance of the cause, the striking of defendant's affidavit of defense from the files, the court's assessing the damages and not submitting the same for assessment to a jury and entering a *nunc pro tunc* order amending the judgment record.

If plaintiff is entitled to recover at all, the defendant does not dispute the amount of the judgment.

That the decree of the Insolvency Court of Hamilton County was final is not open to dispute. It settled all the questions involved in the cause, divorced the parties, decreed alimony to plaintiff and settled the question of the custody of the child of the marriage. It was an appealable order because of its finality. True it is that every decree for alimony is subject to be varied at a subsequent time by the court entering the decree, yet no other court can disturb it, and until such court does so, it remains fast, firm and final.

That a decree for alimony entered in a sister State can be enforced in the courts of this State is no longer to be doubted. The full faith and credit clause of the National Constitution is applicable to such a case and confers jurisdiction upon our courts to entertain and enforce such a decree, the essential requirement being that the decree for alimony shall be one of finality and not temporary, and such is the nature of the decree in the record.

Paulin v. Paulin, 195 Ill. App. 350.

As said in *Dow v. Blake*, 148 Ill. 76: "We think that an action can be maintained in one State upon a final decree for alimony rendered in another State," and the court cite Bishop on Marriage and Divorce, vol. 2, sec. 847, and quote the following:

"A decree for alimony, there being a competent jurisdiction, is a record to which, under the Constitution of the United States must be given full faith and credit in every other State." *Britton v. Chamberlain*, 234 Ill. 246, adheres to the same doctrine. It is said in *Blattner v. Frost*, 44 Ill. App. 580: "While the decree sued upon in this case did order the doing of other things besides the payment of money, yet the sum of \$1,400 is distinctly found to be due and ordered to be paid, not upon any contingency, but absolutely and at all events. Such sum became per force of the decree a debt, liquidated, fixed, certain; completely within the rule which permits actions at law to be brought upon decrees." This language is equally applicable to the decree in suit. We think the Municipal Court had jurisdiction of the cause as a fourth-class case. It is a civil action. *Konow v. Nichols*, 128 Ill. App. 409.

As defendant's affidavit of defense did not state any fact which, if proven, would have justified the court in holding that it constituted a meritorious defense in bar of the action, the court did not err in striking it from the files. Neither in this condition of the record was it error for the court to assess plaintiff's damages. *Mann v. Brown*, 182 Ill. App. 1.

At the time the damages were assessed and judgment entered, the record did not contain an order defaulting defendant for want of a sufficient affidavit of merits. For this defect, and without passing upon the merits of the action, this court reversed and remanded the cause, but subsequently recalled the mandate and granted a rehearing.

Paulin v. Paulin, 195 Ill. App. 350.

The motion of plaintiff to correct the record in this regard was granted and the record corrected accordingly by noting the default of defendant. It is now contended by defendant that the trial judge erred in doing so, as he had no sufficient memorial minute before him from which the record could be corrected. The memorial minute, upon which the court acted, consisted of the entry made by the minute clerk in his minute book, to the correctness of which the minute clerk testified. These minutes were made by the clerk in abbreviated form. It is now urged by defendant that such abbreviations were not in the English language and therefore not sufficient evidence upon which to base the *nunc pro tunc* order, and that *Stein v. Meyers*, 253 Ill. 199, is controlling of such contention. On the other hand, plaintiff distinguishes the *Stein* case, *supra*, from the one at bar and cites *People v. Petit*, 266 Ill. 628, as sustaining the validity of the *nunc pro tunc* order.

We are of the opinion that the abbreviations in the case at bar are much more like the abbreviations in the *Petit* case, *supra*, than in the *Stein* case, *supra*. We have examined with care the abbreviations in the minute clerk's book and are satisfied that all the material abbreviations are readily understandable by lawyers, if not by the average well informed layman. They are not the unintelligible jumble of letters found in the *Stein* case and condemned by the Supreme Court. In the *Petit* case the judge refused to allow the record to be written from the minutes made by the clerk in abbreviated form and the Supreme Court says: "The constitutional provision has no reference to such minutes as those in question here, which are no part of the record but were memoranda from which the record might be made. They are such abbreviations as are frequently used by judges and clerks for making minutes of the proceedings as a guide to indicate to the clerk what the judgment of the court was and to

enable him to write out the formal judgment. It is not necessary that such minutes should contain all the essentials of a judgment, should consist of English words written out at length, or should be clearly intelligible to every person acquainted with the English language. They are not intended for every person's information but for the information of the officers of that particular court, and it is sufficient if their meaning is apparent to such officers." And we say here, as said by the Supreme Court in the *Petit* case, *supra*: "It is apparent from an inspection of these minutes that they were sufficient to enable the clerk to write out the formal judgment of the court." As said in *Tisdale v. Davis & Rankin Bldg. & Mfg. Co.*, 182 Ill. App. 31, an "inspection of the judgment order above set forth does not disclose to this court the omission of any element essential to its validity."

The *nunc pro tunc* order in controversy in no manner added anything to the judgment of the court as originally directed, but simply corrected the error of the clerk in not transcribing from the minute book the judgment which the court had, as appears by that minute book, directed to be entered. The purpose of the trial judge in making the *nunc pro tunc* order was to make a record of an order which the court had made at a previous time, but which, through an error of the clerk, had not been recorded. In the instant case, if the clerk had done his whole duty at the time the order and judgment was transcribed into the record, it would have appeared in just the same form it did after the entry of the *nunc pro tunc* order. *People v. Wilmot*, 254 Ill. 554; *People v. Rosenwald*, 266 Ill. 548; *Zimmer v. Lyon & Healy*, 190 Ill. App. 642.

The clerk's minute book was a part of the archives of the Municipal Court, of which the judges thereof might take judicial notice. While the evidence of the clerks who testified concerning the same was unnecessary, yet no harm to defendant resulted.

Lord & Thomas v. Hahn, 195 Ill. App. 356.

Many other objections of a purely technical character are made by defendant but we do not deem them, in the light of what we have already said, as being pertinent or as warranting further discussion.

We do not find in the record any error justifying a reversal of the judgment of the Municipal Court, and it is therefore affirmed.

Affirmed.

Lord & Thomas, Appellee, v. Daisy K. Hahn, Executrix, Appellant.

Gen. No. 20,272. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed with judgment here. Opinion filed November 15, 1915.

Statement of the Case.

Action by Lord & Thomas, a corporation, plaintiff, against Daisy K. Hahn, executrix of the will and estate of Harry W. Hahn, deceased, defendant, in the Superior Court of Cook county, to recover on a contract with the Sanitary Drinking Cup Company, of which defendant's testator was secretary and treasurer, and whose contract he guaranteed. From a judgment for plaintiff, defendant appeals.

The guaranty is in the following words:

“Chicago, Nov. 15, 1911.

“Lord & Thomas,

“Gentlemen: I guarantee the acct. of the Sanitary Drinking Co. of Ills. to the maximum amount of twenty-five hundred dollars,” and it is signed “Harry W. Hahn.”

Clark v. Selfridge, 195 Ill. App. 357.

It is not denied that Lord & Thomas declined to enter into the contract with the Drinking Cup Company unless it was guaranteed, and Hahn voluntarily offered to be the guarantor, and being secretary and treasurer of the company he was naturally interested in its success, and the scheme of advertising contemplated by the contract was at the time considered to be a means to bring about that end.

McEWEN, WEISSENBACH, SHRIMSKI & MELOAN and LOUIS BRANDES, for appellant.

MOSES, ROSENTHAL & KENNEDY, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

GUARANTY, § 7*—*when sufficient consideration shown.* Where defendant's testator voluntarily guaranteed the account of a corporation, of which he was an officer, with another corporation, a sufficient consideration to support the guaranty is shown where it appears that such corporation refused to make the contract unless guaranteed, and executed the contract on the faith of the guaranty, and in such case it is not of controlling importance that the contract was executed before a written guaranty was signed, if executed on the faith of a promise to guaranty it, which promise was later fulfilled.

Isaiah R. Clark et al., Appellees, v. Rosalie E. Selfridge et al., Appellants.

Gen. No. 20,924.

1. **EQUITY, § 552***—*when failure to strike plea on striking affidavit of defense harmless.* While the better, long-continued and well-established practice is after striking the affidavit of defense to strike the pleas for want of a sufficient affidavit of defense, *held* not re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Clark v. Selfridge, 195 Ill. App. 357.

versible error to proceed to hearing after striking the affidavit of defense as in case of a default without striking the pleas.

2. APPEAL AND ERROR, § 1275*—*when matter reviewed in absence of certificate that bill of exceptions contains all the evidence.* While in a general sense it would be essentially correct to say that where matter relied on in defense is in the bill of exceptions but not in the record, there being no certification that the bill of exceptions contains all the evidence heard, there is a presumption that the court heard sufficient evidence to support its judgment, yet the rule will not apply where the bill of exceptions patently contains all proceedings before the court in the trial of a cause without a jury, and in such case the bill of exceptions will suffice to bring before the Appellate Court for review the question of the legal sufficiency as a defense of the matter relied on.

3. APPEAL AND ERROR, § 1856*—*what rules govern construction of bond.* The doctrine of *strictissimi juris* is the canon of construction governing the liability of sureties on appeal bonds where the action is against both principal and surety.

4. APPEAL AND ERROR, § 1863*—*when appeal prosecuted with effect within condition of bond.* In an action on an appeal bond in a chancery action, conditioned that the principal obligors duly prosecute their appeal with effect, where only the object of the appeal was to have appellant's claim against certain mortgaged premises made a lien thereon, which was denied by the trial court, an order of the Appellate Court modifying the decree of the trial court in that respect and directing that such lien be established is such a material modification of the decree as to constitute a prosecution of the appeal with effect, thus satisfying the condition of the bond.

5. APPEAL AND ERROR, § 1034*—*what judicially noticed.* The Appellate Court will take judicial notice of the substantial and material facts set forth in an affidavit of defense which is of record in that court.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 15, 1915. Rehearing denied November 29, 1915.

SHEPARD, McCORMICK, THOMASON & PATTERSON, for appellants.

HENRY W. W. LEMAN and FRANK H. CULVER, for appellees.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action of debt on an appeal bond in the penalty of \$1,500 given in the case of *Wright v. Chandler*, 180 Ill. App. 476, in which the condition was that the principal obligors duly prosecute their appeal with effect. To the declaration the defendants interposed several pleas, in the second of which they set up in bar of the action the foreclosure proceedings in the trial court, the appeal to this court and the final order of this court, and contend thereby that the appeal, in which the bond sued upon was given, was prosecuted with effect.

With their pleas the defendants filed an affidavit of merits setting forth in detail the matters and proceedings contained in their second plea, which, on motion of the plaintiff was stricken from the files as not stating facts which constituted a defense to the action, and thereupon the court proceeded to assess damages and found the debt to be \$1,500 and assessed the damages at \$1,500, the debt to be discharged upon the payment of damages, and upon this finding judgment was entered and this appeal prosecuted.

The matter appealed against in *Wright v. Chandler, supra*, was the finding in the foreclosure decree that defendant, Rosalie E. Selfridge, was not entitled to a lien upon the mortgaged premises for the amount advanced by Chandler, the trustee, under power in the trust deed, for certain taxes and redemption from tax sales of the mortgaged premises.

In the judgment entered by this court in *Wright v. Chandler, supra*, the decree appealed from was modified, the court finding, "That neither in the record and proceedings of the Superior Court of Cook county aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous or defective, except in so far as said decree as entered fails to adjudge and decree that defendant, Rosalie A. Selfridge, the equitable

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Clark v. Selfridge, 195 Ill. App. 357.

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assignee of Frank R. Chandler, Trustee, is entitled to a lien on the mortgaged premises for the sum of Seven Hundred and Twenty and 17/100 (\$720.17) Dollars, together with interest thereon at the rate of five per cent. (5%) per annum, from the day the decree in said cause was entered, for taxes paid on said premises and amounts paid to redeem the same from tax sales by said Frank R. Chandler, Trustee, but that said lien is junior and subsequent to the lien of the complainants as therein adjudged and decreed. Therefore, it is considered by the court that said decree be, and the same is hereby modified by incorporating therein the following:

“It is ordered, adjudged and decreed that the sum of Seven Hundred and Twenty and 17/100 (\$720.17) Dollars, be, and the same is hereby adjudged to Rosalie A. Selfridge, the equitable assignee of Frank R. Chandler, Trustee, together with interest thereon at the rate of five per cent. (5%) per annum from the day the decree in said cause was entered for taxes paid on said premises and amounts paid to redeem the same from tax sales, by said Frank R. Chandler, Trustee, and that said Rosalie A. Selfridge have a lien on said mortgaged premises for said amount, together with said interest, but that said lien is junior and subsequent to the lien of complainants as adjudged and decreed in said decree.

“And it is further considered by the court that said decree, as modified, be affirmed and stand in full force and effect, notwithstanding the said matters and things therein assigned for error.”

When the court struck the defendants' affidavit of merits from the files, the pleas of defendants remained. While in point of law the issues then before the court were encompassed within the declaration and the pleas, the court proceeded to the hearing as in cases of default. While this irregularity did not amount to reversible error, still the better, long-continued and

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well-established practice is, in such a situation, to strike the pleas for want of a sufficient affidavit of merits.

Plaintiffs with much vigor contend that the affidavit is not before us, because the stricken affidavit is in the bill of exceptions and not in the record, there being no certification that the bill of exceptions contains all the evidence heard or considered by the court; and furthermore, that in this condition of the record the presumption obtains that the court heard sufficient evidence to support its judgment. While as a general proposition this contention is in its essence correct, still it has its exception, and we think the case at bar falls within the exception.

This was not a jury trial. The whole case was heard by the trial judge. The bill of exceptions shows the whole proceeding, every step and stage of it to its conclusion. There is no room to add by surmise as to what may have taken place. The whole proceeding is before us. Every word of counsel and of the court in that trial and all the rulings of the trial judge are so patently in the bill of exceptions, that any presumption not arising from its context is excluded. We think the ruling and the reasoning of *People v. Scanlan*, 265 Ill. 609, are clearly controlling of our decision on this question. In the *Scanlan* case, *supra*, the court say:

“Appellee contends that the bill of exceptions is insufficient because it is not shown, either by the certificate of the trial judge or otherwise, to contain all the evidence heard or considered by the court. We regard the bill of exceptions sufficient for the purpose of presenting the error which we have above considered, although there is no direct statement in the bill of exceptions, or in the certificate of the trial judge thereto, that it contains all the evidence.”

The bill of exceptions in this case is sufficient to bring before us for decision the legal question as to whether the ruling of the trial judge in striking defendants' affidavit of defense from the files was erroneous.

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The evidence on the hearing consisted of certain calculations made by counsel for plaintiff, in the verity of which the court entered judgment. All this appears *in extenso* in the bill of exceptions with the rulings of the court thereon. The judgment rests for its integrity upon the correctness of these proceedings.

The bill of exceptions recites the following at the conclusion of the hearing:

“THE COURT: You have the amount, the date of sale, and they have the right to have that credited, and then they have the right to be immediately paid whatever they are due.

MR. CULVER: I have figured it up.

THE COURT: Now that is a question of computation. I think you are entitled to a decree and Mr. Shepard may save his point. How much is due in this case, Mr. Culver?

MR. CULVER: There is due in this case \$1,500.

THE COURT: Judgment will be entered for the plaintiff in this case in the sum of \$1,500.

MR. SHEPARD: The defendants move in arrest of judgment.

THE COURT: Motion is denied.

To which action of the court in so denying the motion in arrest of judgment of the defendants, the defendants by their counsel then and there duly excepted.

THE COURT: Judgment will be entered here for the sum of \$1,500 debt and \$1,500 damages.

To which action of the court in so entering judgment, the defendants by their counsel then and there duly excepted.

MR. SHEPARD: We pray an appeal.

THE COURT: The defense have prayed and are allowed an appeal to the Appellate Court, with leave to file a bill of exceptions in sixty days and a bond in the sum of \$1,750 in thirty days, and exceptions by the defendants to all these orders.”

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Then follows the certificate of the trial judge to the bill of exceptions, etc.

As said by the Supreme Court in the *Scanlan* case, *supra*, we say here:

“So in the case at bar, those portions of the bill of exceptions above quoted, when considered collectively, are equivalent to an express averment that the bill of exceptions contains all the evidence heard in the cause.”

In citing *Cerny v. Glos*, 261 Ill. 331, the court say in the *Scanlan* case, *supra*: “The certificate of evidence disclosed practically the same situation as is presented by this bill of exceptions, and it was held that it showed, on its face, that it contained all the evidence.”

On the motion to strike the affidavit of defense, Mr. Culver, for plaintiffs, said: “I move that the affidavit of merits be stricken from the files as not being sufficient in law to constitute a defense. It shows upon its face that it does not state a defense to this action.” And the court in its ruling said:

“Upon a consideration of this affidavit of meritorious defense, I am of the opinion, Mr. Shepard, that it does not state a defense to this action, even admitting all the facts it states to be true, and for that reason I shall strike it from the files.”

As said in *Haberer v. Hansen*, 148 Ill. App. 83: “The doctrine of *strictissimi juris* is the canon of construction governing the liability of sureties on bonds.” This suit being against both principal and surety, this doctrine of construction is applicable.

The only question now remaining for decision is: Was the order modifying the decree in *Wright v. Chandler*, *supra*, material or immaterial? All that appellants in that case sought by their appeal was to have their claim made a lien upon the mortgaged premises. This the trial court denied them, but this court granted their claim and directed the court below to so modify the decree and it was done. We think

Clark v. Selfridge, 195 Ill. App. 364.

it clear that this was such a material modification of the decree appealed from as to constitute a prosecution of that appeal with effect, thereby satisfying the condition of the appeal bond.

We are referred by plaintiffs' counsel to the case of *Ely v. King-Richardson Co.*, 265 Ill. 148, as conclusively sustaining their contention in this regard. We cannot so interpret the case. There the decree required the delivery only of the notes involved in the litigation, while the decree as modified on review required the notes to be indorsed "without recourse." This was held to be an immaterial modification, and it was; but in the case at bar the appellants procured substantially all they sought, so that the modification was material, and we so hold.

The substantial and material facts set forth in the affidavit of defense are of record in this court, of which we will take judicial notice.

The judgment of the Superior Court is erroneous and is therefore reversed, and as the right to recover is predicated upon the bond and the record in *Wright v. Chandler, supra*, which together will not permit of a recovery, the cause is not remanded.

Reversed.

Isaiah R. Clark et al., Appellees, v. Rosalie A. Selfridge et al., Appellants.

Gen. Nos. 20,920-20,923. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the October term, 1914. Reversed. Opinion filed November 15, 1915. Rehearing denied November 29, 1915.

Hayes v. Sampsell, 195 Ill. App. 365.

Statement of the Case.

Action by Isaiah R. Clark and others, plaintiffs, against Rosalie A. Selfridge, and others, defendants, in the Superior Court of Cook county.

These cases present the same questions that are presented in the case of *Clark v. Selfridge*, No. 20,924, *ante*, p. 357, and were submitted on the abstracts and briefs filed in that case.

SHEPARD, McCORMICK, THOMASON & PATTERSON, for appellants.

HENRY W. LEMAN and FRANK H. CULVER, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

William J. Hayes by Elizabeth J. Casey, Appellee, v. Marshall E. Sampsell, Receiver of Chicago Union Traction Company, Appellant.

Gen. No. 21,001.

1. CARRIERS, § 314*—*when nonpayment of fare not a defense in action for injury to person on car.* In an action to recover for personal injury to a ten-year-old boy, owing to the negligent operation of defendant's electric car, where it appeared that plaintiff boarded the car at the invitation of the motorman and rode thereon for some distance without paying fare, a judgment for plaintiff *held* not erroneous, for the reason that in such case the only question is whether plaintiff was lawfully on the car, and it is not a defense that plaintiff paid no fare.

2. CARRIERS, § 314*—*when liable for injury to child boarding car on invitation of motorman.* In an action to recover for personal injury to a boy, where it appeared that plaintiff boarded defendant's electric car at the invitation of defendant's motorman, such invitation was an act within the scope of such motorman's employment, although

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hayes v. Sampsell, 195 Ill. App. 365.

such motorman may have acted contrary to defendant's orders, and may have been answerable for disobedience of defendant's rules, for the reason that such act of such motorman could not affect the status of plaintiff on defendant's car or render his presence thereon unlawful.

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed November 15, 1915. Rehearing denied November 29, 1915.

JOSEPH D. RYAN and FRANK L. KRIETE, for appellant;
W. W. GURLEY and J. R. GUILLIAMS, of counsel.

THOMAS E. ROONEY and FERDINAND GOSS, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

William J. Hayes, the plaintiff, by his next friend, recovered in the Superior Court a judgment, entered upon the verdict of a jury, against the defendant for \$5,000, and defendant appeals.

The several counts of the declaration charge in some that plaintiff was a passenger and in others that he was lawfully upon the car from which he was thrown by its jerking upon starting after having slowed down, and was thereby injured. The general issue was the only plea filed by defendant. No questions arise upon the pleadings or as to the amount of the damages awarded. Defendant admits in its brief the negligence charged in the following words: "As to the question of defendant's negligence, it is not contended that the verdict, as to that issue, is against the manifest weight of the evidence."

The right to a reversal is predicated upon the contention that plaintiff was a trespasser; that all the duty defendant owed him was not to wantonly or wilfully injure him, and that there is no evidence that plaintiff was injured through any wilful or wanton conduct on the part of defendant. But that is not the theory of plaintiff's case or of defendant's liability.

While plaintiff was not a passenger for hire, still he was not a trespasser. We think the evidence conclusively proves that plaintiff was lawfully upon the car at the time he was injured. The facts which so demonstrate are not in dispute.

Plaintiff at the time was a little past his tenth year. His stepfather was a conductor on one of defendant's cars. The little fellow had been in the habit of carrying to his stepfather his midday meal and in that way had formed, in boy fashion, a speaking acquaintance with some of defendant's conductors and motormen. On the day of the accident, which happened after school between four and five o'clock in the afternoon, plaintiff came out of a grocery store on the southeast corner of Francisco and Van Buren streets, when the motorman of the car from which plaintiff was thrown called to him, "Come here. What are you doing there?" Evidently regarding this as an invitation to board the car and take a ride with the motorman, plaintiff got upon the car and stood upon the first step. Boy like, he talked with the motorman, and among other things told him that he lived on Mozart street and asked him to stop there. Plaintiff continued to ride upon the step to the middle of the block, when the car slowed down and then started again with a sudden jerk, which threw plaintiff off the step of the car. He was thrown to the roadway and the car ran over his right arm, so badly injuring it that it had to be amputated.

As plaintiff was lawfully upon the car at the time of the accident, defendant is liable in damages for the injuries to plaintiff, resulting from the negligence of which it is confessedly guilty.

The fact that plaintiff paid no fare and did not intend doing so, does not affect the right of recovery, if he was lawfully on the car. As said in the early case of *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9: "When ✓ a person is upon a train, under such circumstances

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(without having paid his fare), the only inquiry is, whether he was lawfully there, and not whether he had paid his money for the privilege. So that, in point of fact, it can make no difference in this case whether plaintiff in error had paid for his passage, or whether he was there by permission, to be carried without compensation, as it does not appear that it was unlawful."

There are many decisions akin to the case at bar involving accidents to children occasioned by such children riding upon cars at the invitation of those in charge and without the payment of fare.

Wilton v. Middlesex R. Co., 107 Mass. 108, was a case of a nine-year-old girl, who, with others, boarded the defendant's car at the invitation of the driver and did not pay any fare, and was injured. It was conceded that the little girl was not a passenger for hire and that the driver had no authority to take her upon the car and carry her, unless such authority is to be implied from the fact of his employment as driver, and the court say: "Upon these facts, it is clear that it would be competent for the jury to find that the beckoning by the driver was intended and understood as an invitation to the plaintiff to get upon the car and ride. In accepting this invitation and getting upon the car, we think she was not a trespasser, there being no evidence of collusion between her and the driver to defraud the corporation."

While defendant's motorman may have acted contrary to orders, still it was an act in the course of his employment, notwithstanding he may have been answerable to defendant for disobedience of its rules. Such conduct could not affect the status of plaintiff with the defendant or detract from the fact that he was lawfully upon its car. *Cleveland, C., C. & St. L. R. Co. v. Best*, 68 Ill. App. 532.

Brennan v. Fairhaven & W. R. Co., 45 Conn. 284, was a case similar in fact and principle to the one at bar, in which the plaintiff, a boy of about the same age

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as the plaintiff here, had not paid his fare. In *Drew v. Sixth Ave. Ry. Co.*, 26 N. Y. 49, the plaintiff was an eight-year-old boy riding free at the invitation of a brakeman. A recovery was had and sustained. *Pittsburg, A. & M. Passenger Ry. Co. v. Caldwell*, 74 Pa. St. 421, is a case where a very immature child, in the charge of a girl eleven years of age, was riding on a street car, neither of them having paid or intending to pay their fare, the ride having been solicited of the driver by the older girl. There was a recovery in the trial court, which was affirmed on review. *Evansville St. Ry. Co. v. Meadows*, 13 Ind. App. 155, is in all its essential particulars of law and fact akin to the case at bar.

There are no errors in the court's instructions to the jury. Instruction No. 1 proffered by defendant was properly refused, as it erroneously stated as the law that if plaintiff had not paid his fare and did not intend to do so, he could not recover.

The judgment of the Superior Court being without error, is affirmed.

Affirmed.

United States Brewing Company of Chicago, Defendant in Error, v. Joe Pohek, Plaintiff in Error.

Gen. No. 21,123. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed November 15, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action of forcible detainer by the United States Brewing Company of Chicago, a corporation, plaintiff, against Joe Pohek, defendant, in the Municipal Court

Lepman & Heggie v. Chicago, R. I. & P. Ry. Co., 195 Ill. App. 370.

of Chicago. To reverse a judgment for plaintiff for possession, defendant prosecutes this writ of error.

THOMAS J. LYNCH and RUDOLPH FRANKENSTEIN, for plaintiff in error.

WINSTON, PAYNE, STRAWN & SHAW, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **FORCIBLE ENTRY AND DETAINER, § 24***—*what not a defense.* In an action of forcible detainer, a tenant cannot defend by denying or attacking his landlord's title, nor can he show that such title has terminated, for the reason that the action is possessory solely, and is a summary statutory action for the restoration of the possession of land to one who has wrongfully been kept out or deprived of such possession, and for the further reason that in such action the question of title cannot be tried.

2. **FORCIBLE ENTRY AND DETAINER, § 108***—*when attempt to recover personalty disregarded.* Personal property cannot be made the subject of an action of forcible detainer, but where a complaint in such an action seeks to recover for personal property as well as the possession of real estate, such portion of the complaint will be treated as surplusage where that phase of the case was not presented to the trial court, and where the judgment sought to be reversed is for the possession of land and not for that of the personal property described by the complaint as being in and on the demised premises.

Lepman & Heggie, Defendant in Error, v. Chicago, Rock Island & Pacific Railway Company, Plaintiff in Error.

Gen. No. 21,133.

1. **CARRIERS, § 134***—*when consignee not entitled to sue for injury to goods.* Where, on shipping a carload of eggs, the consignor at-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lepman & Heggie v. Chicago, R. I. & P. Ry. Co., 195 Ill. App. 370.

tached a draft for the purchase price to the bill of lading, sending it to a bank for collection, and the consignee refused to accept the eggs because of damage in transit, but later accepted same, under agreement with the consignor, at a reduced price, the consignee is not entitled to maintain an action against the carrier to recover for the negligent injury to the goods, title to same not having been in the consignee at the time the damage was inflicted, and no assignment of the right of action therefor having been alleged or proved.

2. CARRIERS, § 132*—*when showing of title to damaged goods necessary*. The right to recover damages against a carrier for negligent carriage of goods is a chose in action, and where the consignee seeks to recover therefor he must show title in himself at the time of the infliction of the injury, or an assignment to him of such chose in action.

3. CARRIERS, § 134*—*what does not entitle consignee to sue for damage to goods*. Where, at the time of the negligent injury to goods by a carrier, the title thereto was not in the consignee, the subsequent purchase of the same by him upon different terms, without paying a draft accompanying the bill of lading nor securing possession of the latter, does not operate retrospectively, so as to entitle the consignee to recover for damages inflicted in transit.

Error to the Municipal Court of Chicago; the Hon. JOHN A. MAHONEY, Judge, presiding. Heard in this court at the March term, 1915. Reversed. Opinion filed November 15, 1915.

MARCUS L. BELL, ALBERT B. ENOCH and CHARLES T. SCHWARZ, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

T. Jensen & Bros. of Marion, Kansas, shipped to plaintiff by the defendant railroad one carload of eggs, consisting of 400 cases. T. Jensen & Bros. drew a draft on plaintiff for the agreed price of the eggs, attached the same to the bill of lading and sent it through a bank for collection. The eggs were damaged in transit and plaintiff refused to accept them. After the exchange of telegrams and telephone messages between plaintiff and T. Jensen & Bros., the plaintiff finally

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lepman & Heggie v. Chicago, R. I. & P. Ry. Co., 195 Ill. App. 370.

agreed to accept the eggs at a reduction from the contract price. Acting upon this latter agreement, plaintiff took possession of the eggs, re-sorted them in the car and took away all but twenty-two cases of them, which were left in the car. The eggs remaining in the car were damaged, some being broken and others being what, in the parlance of the egg trade, are known as "leakers and checks." The eggs being perishable, the defendant sold them, realizing therefor \$70.53, which sum defendant tendered to plaintiff in settlement of the cause of action sued on.

The cause was tried before the court without a jury. The court found against the defendant and gave judgment for \$149, and defendant seeks this review.

The action is one sounding in tort for the negligent carriage of the eggs by defendant.

It is not disputed that plaintiff neither paid the draft attached to the bill of lading nor had possession of the bill of lading. While it is claimed that it was agreed that the claim against defendant for damage to the eggs should belong to the defendant in error, there is no assignment of such chose in action from T. Jensen & Bros. to plaintiff, set up in plaintiff's pleading, and no such assignment appears in the record as evidence. *Leemon v. Grand Crossing Tack Co.*, 187 Ill. App. 247, is conclusive on this point, where it was said:

"However, we must reverse this judgment for the reason that plaintiff has not in his pleading, on oath or by affidavit, alleged that he was the actual bona fide owner of this chose in action, and how and when he acquired title, as required by sec. 18, ch. 110, Illinois Statutes (J. & A. ¶ 8555). It is no answer to say that the absence of this affidavit was not made an issue by any affidavit of merits filed by defendant in the court below, as we do not understand that the affidavit of merits should contain conclusions of law."

Defendant in its brief says: "Upon considering the circumstances surrounding the transaction, plaintiff in error is of the opinion that damages should be paid

Newman v. Newman Clock Co., 195 Ill. App. 373.

T. Jensen & Bros., and in order to avoid a double payment this writ of error was sued out.”

It is clear that the title to the eggs at the time they were damaged was in the consignor, Jensen & Bros., and not in the plaintiff. The consignor at that time had not parted with its title to the eggs. It had neither paid the draft attached to the bill of lading nor obtained possession of the bill of lading. These were essential conditions to be performed by plaintiff in order to vest it with title to the eggs. The fact that subsequently plaintiff purchased the eggs of the consignor on different terms had no retroactive effect, neither did such subsequent purchase operate to change the title to the eggs at the time they were damaged from the consignor to plaintiff. The right to recover damages for the negligent carrying of the eggs was a chose in action. This right neither by the pleadings nor proof was shown to have been shifted from the consignor to the plaintiff, although plaintiff proceeds upon the theory that at the time of the damage it was the consignee of the eggs. Therefore plaintiff has no right of action against defendant for its negligent carrying of the eggs.

The \$70.53 which defendant requests this court to adjudge to plaintiff not being in this case, we are without jurisdiction to so order.

As plaintiff has no cause of action for damages resulting from the negligent carriage of the eggs in suit, the judgment of the Municipal Court is reversed.

Reversed.

Albert A. Newman, Appellee, v. Newman Clock Company, Appellant.

Gen. No. 20,950. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Reversed. Opinion filed November 16, 1915.

Newman v. Newman Clock Co., 195 Ill. App. 373.

Statement of the Case.

Action by Albert A. Newman, plaintiff, against the Newman Clock Company, defendant, in the Municipal Court of Chicago, to recover instalments of salary claimed under a written contract. Evidence of a judgment obtained in a prior action brought to recover other instalments of salary under the same contract was admitted as an adjudication of the question of liability. Since the rendition of the judgment appealed from, such prior judgment has been reversed by the Supreme Court (268 Ill. 426, aff'g 191 Ill. App. 343), holding *as matter of law* that the acts of plaintiff shown by the record in that case amounted to a breach of the contract releasing defendant from liability thereon. From a judgment for plaintiff, defendant appeals.

AMOS W. MARSTON and WINSTON, PAYNE, STRAWN & SHAW, for appellant.

WEST & ECKHART, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1165*—*what is effect of confession of error.* A confession of error does not preclude the consideration of errors not confessed.

2. APPEAL AND ERROR, § 1783*—*when reversal without remand proper on confession of error.* Where, in an action to recover an instalment of salary, the appellee confessed error in the admission in evidence of a judgment in his favor for a prior instalment, which had since been reversed by the Supreme Court holding that defendant was not liable, the court, notwithstanding plaintiff's confession of error, may consider defendant's assignment of error based upon the refusal of the trial court to give a peremptory instruction, and since, under the undisputed facts, there could be no recovery, may reverse without remanding.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Zisinatos et al. v. Cont. etc. Bk. et al., 195 Ill. App. 375.

**Panagiotis Zisinatos and Andreas Galineas, Appellees,
v. Continental & Commercial National Bank and
Anton J. Cermak, Bailiff, Appellants.**

Gen. No. 22,017. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. R. F. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Appeal dismissed. Opinion filed November 16, 1915.

Statement of the Case.

Action by Panagiotis Zisinatos and Andreas Galineas, plaintiffs, against the Continental & Commercial National Bank and Anton J. Cermak, bailiff of the Municipal Court of Chicago, defendants, in the Municipal Court of Chicago. From a judgment for plaintiffs, defendants appeal.

MAYER, MEYER, AUSTRIAN & PLATT, for appellants.

G. A. BURESH, for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 10*—*when action for trial of right to property is of fourth class.* A proceeding for the trial of the right to property is an action of the fourth class under the Municipal Court Act, sec. 2, subd. 4 (d) (J. & A. ¶ 3314).

2. MUNICIPAL COURT OF CHICAGO, § 27*—*when extension of time for filing bill of exceptions not in apt time.* Where it appears that an extension of the time for filing a bill of exceptions in a fourth-class action under section 2, subd. 4 (d) of the Municipal Court Act (J. & A. ¶ 3314) was not made within thirty days from the rendition of the judgment appealed from, the Appellate Court will strike the bill of exceptions on motion of appellee, for the reason that an extension of such filing time is not allowed except within thirty days from the rendition of such judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Isaacson, 195 Ill. App. 376.

3. MUNICIPAL COURT OF CHICAGO, § 24*—*when judgment not appealable.* There being no statute authorizing an appeal from the Municipal Court of Chicago in a fourth-class case, an appeal cannot be taken in such case, and if taken will be dismissed.

City of Chicago, Defendant in Error, v. Samuel Isaacson, Plaintiff in Error.

Gen. No. 21,492. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed November 29, 1915.

Statement of the Case.

Action by the City of Chicago, plaintiff, against Samuel Isaacson, defendant, in the Municipal Court of Chicago. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

WILLIAM SLACK, for plaintiff in error; ROMAN G. LEWIS, of counsel.

RICHARD S. FOLSOM, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 26*—*when bill of exceptions insufficient.* A document purporting to be a bill of exceptions which is but a recital of the proceedings of the trial without containing either the names of the witnesses or the evidence is not "a correct statement * * * of the facts appearing upon the trial and all questions of law," or "a correct stenographic report of the proceedings at the trial," required by section 23 of the Municipal Court Act, Illinois Statutes, ch. 37 (J. & A. ¶ 3335), and will be stricken on motion of appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Legowski v. Moreland & Co., 195 Ill. App. 377.

City of Chicago, Defendant in Error, v. Samuel Isaacson, Plaintiff in Error.

Gen. No. 21,493. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed November 29, 1915.

Statement of the Case.

Action by the City of Chicago, plaintiff, against Samuel Isaacson, defendant, in the Municipal Court of Chicago. The facts and reasons for the decision in this case were identical with those in *City of Chicago v. Isaacson*, No. 21,492, *ante*, p. 376. The decision in that case is applicable to this case.

WILLIAM SLACK, for plaintiff in error; ROMAN G. LEWIS, of counsel.

RICHARD S. FOLSOM, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Leo Legowski, Plaintiff in Error, v. Moreland & Company, Defendant in Error.

Gen. No. 21,081. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Leo Legowski, plaintiff, against Moreland & Company, defendant, in the Superior Court of Cook

Legowski v. Moreland & Co., 195 Ill. App. 377.

county, to recover for personal injuries received by plaintiff while employed by defendant, as a result of a fall from some uncovered floor joists across which he was walking in a building under construction by defendant. To reverse a judgment of *nil capiat* for defendant entered on a verdict of not guilty, plaintiff prosecutes this writ of error.

At the time of the accident plaintiff was forty-one years old, with fifteen years' experience working on buildings. He had worked on the present building four or five months as a general laborer, carrying brick, etc. He testified that he was ordered by the foreman to carry bricks to a bricklayer; that to reach the bricklayer it was necessary to cross on floor joists which were uncovered, and plaintiff said to the foreman that planks should be laid on the joists over which he could walk, but the foreman said this was unnecessary; that as plaintiff stepped on a joist it "wobbled" and he fell, striking his side on the edge of the joist. On the contrary there was sufficient testimony to cause the jury to believe that nothing was said by plaintiff or the foreman about planks; that plaintiff was thoroughly experienced in walking over uncovered joists and that that was the customary thing for workmen to do; that the joist in question was not loose and did not "wobble"; other workmen had walked on it and noticed nothing wrong with it; that plaintiff fell because he stepped on a mortar board lying on the joists, which tipped.

GALLAGHER & MESSNER, for plaintiff in error.

RALPH F. POTTER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Wright v. Rodgers et al., 195 Ill. App. 379.

Abstract of the Decision.

1. **MASTER AND SERVANT, § 137***—*when judgment for defendant sustained.* In an action by an employee to recover for personal injuries due to a fall from uncovered floor joists in a building under construction, where plaintiff was working as a general laborer, evidence *held* to sustain a judgment for defendant.

2. **MASTER AND SERVANT, § 137***—*when structural act inapplicable.* In an action to recover for personal injuries sustained by plaintiff as a result of falling from joists across which he was walking while employed by defendant as a general laborer, instructions which ignored section 1 of the "Structural Act" (Hurd's Rev. St., ch. 48, J. & A. § 5368), relating to the construction of scaffolds, hoists, cranes, etc., *held* not erroneous for the reason that plaintiff's fall was not due to defects in any of the appliances mentioned in that statute, which had no application to the case.

William T. Wright, Plaintiff in Error, v. John L. Rodgers and Mrs. John L. Rodgers, Defendants in Error.

Gen. No. 21,146. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action of replevin by William T. Wright, plaintiff, against John L. Rodgers and Mrs. John L. Rodgers, defendants, to recover possession of a dog. To reverse a judgment for defendant, plaintiff prosecutes this writ of error.

MARTIN & MARTIN, for plaintiff in error.

JULIUS GOLDZIER and ADOLPH S. FROEHLICH, for defendants in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Haller v. Hopkins, 195 Ill. App. 380.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

REPLEVIN, § 164*—*when judgment sustained.* In an action of replevin to recover possession of a dog, where the evidence was conflicting as to its identity, but the trial court had opportunity to verify the testimony of witnesses by examination and observation of the dog, which was produced in the trial court, *held* to sustain a judgment for the defendant.

**Johanna Haller, Defendant in Error, v. R. N. Hopkins,
Plaintiff in Error.**

Gen. No. 21,158. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action of replevin by Johanna Haller, plaintiff, against R. N. Hopkins, defendant, in the Municipal Court of Chicago, to recover possession of goods wrongfully seized on a distress warrant as the property of a third person. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

Defendant, under a distress warrant authorizing him to distrain for rent due from Walter A. Sanoica for premises No. 2013 West North avenue, seized store fixtures which Johanna Haller, plaintiff, claimed belonged to her and not to Sanoica. The property seized consisted of show cases, cash register and desk.

The evidence tended to prove that prior to March 1, 1909, this property belonged to Otto G. Haller and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Haller v. Hopkins, 195 Ill. App. 380.

was used in a drug store owned by him. On that date by bill of sale he conveyed this property to plaintiff, his wife, and the bill of sale was duly recorded in the recorder's office of Cook county. Subsequently Otto G. Haller died. On March 30, 1912, plaintiff, who was not a druggist, made an agreement with Sanoica, who was a druggist, to manage the drug store at No. 2013 West North avenue for a period ending March 31, 1913, which agreement was subsequently extended for a period of five years. By this agreement the stock and fixtures were leased to Sanoica for a rental payable in monthly instalments. He was also to assume the rent of the store room No. 2013 West North avenue. The lease of this store room to Haller (although the exact lessee does not clearly appear) apparently having terminated, a new lease of No. 2013 was made by Tabor, Fay *et al.*, trustees, etc., who had recently purchased this property, to Sanoica. This lease was dated September 22, 1913, and was for a period of about six years. Sanoica was unable to keep up his payments to plaintiff under his contract with her, and about September, 1914, by mutual agreement this contract was terminated and the stock and fixtures of the drug store were moved out of No. 2013 and into No. 2011, a store room which she had leased. Sanoica continued working for her. The distress warrant was for rent due from Sanoica for October, 1914, of No. 2013, but defendant seized the property which was in plaintiff's store, No. 2011.

The landlords, through their agent, were informed two days before the levy that plaintiff and not Sanoica owned the store, and at the time of the levy the defendant was specifically so informed.

FRANKLIN E. VAUGHAN, for plaintiff in error.

LOUIS PINDERSKI and J. ARTHUR JOHNSON, for defendant in error.

Haller v. Hopkins, 195 Ill. App. 380.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 366*—*when title to distrained property shown to be in third person.* In an action of replevin to recover possession of personal property wrongfully seized on a distress warrant as the property of a third person, evidence examined and a finding that at the time the distress warrant was levied plaintiff had both title to and possession of the property sought to be recovered, *held* warranted by the evidence.

2. LANDLORD AND TENANT, § 366*—*when landlord not misled as to ownership in distraining property.* In an action of replevin to recover personal property belonging to plaintiff, consisting of fixtures formerly used in a drug store which were wrongfully seized on a distress warrant against a third person, where it appeared that the property when seized was not in the possession of such third person and that plaintiff claimed under a bill of sale duly recorded, and where it further appeared that plaintiff notified the landlord and defendant of her title before the seizure was made, *held* that such landlord could not have been misled as to the title to the goods, for the reason that the record of such bill of sale was constructive notice of plaintiff's title, and defendant having acted in the face of notice of plaintiff's title, any prior statements by such third person, claiming title in himself, if competent, would not excuse the act of defendant or affect plaintiff's right to maintain the action.

3. LANDLORD AND TENANT, § 44*—*when demand unnecessary.* Where a taking of personal property is wrongful, a demand is not necessary in order to maintain replevin to recover the goods taken.

4. REPLEVIN, § 114*—*what evidence admissible in action to recover distrained property.* In an action of replevin to recover goods of plaintiff wrongfully seized by defendant under a distress warrant against a third person, a bill of sale duly recorded under which plaintiff claimed title to the goods, as well as a contract between plaintiff and such third person relating to the goods in question, are competent on the question of plaintiff's title to the goods sought to be replevied, for the reason that whether or not such contract was a contract of sale in so far as the stock of a drug store was concerned, yet as to the fixtures it was clearly a contract of lease.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lejkowska v. Godlewski, 195 Ill. App. 383.

Clara Lejkowska, Defendant in Error, v. A. M. Godlewski, Plaintiff in Error.

Gen. No. 21,183. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Clara Lejkowska, plaintiff, against A. M. Godlewski, defendant, in the Municipal Court of Chicago. To reverse a judgment for plaintiff for eight hundred dollars, defendant prosecutes this writ of error.

W. G. ANDERSON, for plaintiff in error.

CAVENDER & KAISER, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 943***—*when defect in record places burden of proof on plaintiff in error.* Where a writ of error brings up only the statutory record, without a bill of exceptions, statement of facts or stenographic report of the proceedings in the trial court, plaintiff in error has the burden of showing affirmatively that such record shows the omission of something to his disadvantage, and in the absence of such a showing the legality of the proceedings shown by the record will be presumed.

2. **DISMISSAL, NONSUIT AND DISCONTINUANCE, § 11***—*when allowed as to one defendant.* Where two defendants are served, it is not error to allow plaintiff before trial to dismiss as to one defendant and to amend her statement of claim as to the other, even though the defendant had no notice, for the reason that when defendant is brought into court by service of process on him, it is his duty to be and appear until the case is disposed of, without further notice.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gillis v. Krulewich, 195 Ill. App. 384.

Paul Gilis, also known as Powel Gilis, Defendant in Error, v. H. Krulewich, Plaintiff in Error.

Gen. No. 21,193. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Paul Gilis, also known as Powel Gilis, plaintiff, against H. Krulewich, defendant, in the Superior Court of Cook county, to recover money alleged to have been deposited by plaintiff in defendant's savings bank. It was not disputed that a man named *Powel* Gilis made deposits and is entitled to withdraw the same, and the question was as to his identity with plaintiff. To reverse a judgment for plaintiff for \$237, defendant prosecutes this writ of error.

Plaintiff has possession of the bank book issued to Powel Gilis, and testified that he received it when he opened his account with defendant; that he made the deposits and received the withdrawals entered in the book; that the signature on the identification card was made by him. Other witnesses testified that plaintiff is the man to whom this book was issued and who had an account with defendant. Defendant introduced testimony tending to show that the signature of plaintiff was not made by the man who signed the identification card when the account was opened.

M. A. MILKEWITCH, for plaintiff in error.

E. P. BRADCHULIS, for defendant in error; ANTHONY J. SCHMIDT, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Schultz v. National Brewing Co., 195 Ill. App. 385.

Abstract of the Decision.

1. **BANKS AND BANKING, § 200***—*when evidence sufficient to show identity of depositor.* In an action to recover savings bank deposits made by a man named *Powel G.*, where plaintiff's name was *Paul G.* and where plaintiff's identity with such depositor was disputed, evidence, including disputed signatures, examined and *held* sufficient to prove that plaintiff was the person who made the deposits in question.

2. **TRIAL, § 285***—*when case not argued on trial by court.* A court trying a case without a jury is not required to listen to arguments of counsel.

3. **COSTS, § 67***—*when statutory damages not allowed.* On an appeal in an action to recover savings bank deposits made by plaintiff, *held* that plaintiff could not recover statutory damages.

**Margaretha Schultz, Administratrix, Plaintiff in Error,
v. National Brewing Company, Defendant in Error.**

Gen. No. 21,214. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 6, 1915. Rehearing denied December 20, 1915.

Statement of the Case.

Action by Margaretha Schultz, administratrix of the estate of Frederick Schultz, deceased, plaintiff, against the National Brewing Company, defendant, in the Superior Court of Cook county, to recover for the death of plaintiff's intestate. To reverse a judgment of *nil capiat* for defendant, entered on a verdict of not guilty ordered by the court, plaintiff prosecutes this writ of error.

Plaintiff's evidence tended to show that her intestate, while employed as a barn boss and engaged in and about his duties near a grain and malt elevator owned

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Schultz v. National Brewing Co., 195 Ill. App. 385.

and operated by defendant, received injuries from an explosion in the elevator which resulted in his death. There was evidence tending to show the presence in the elevator of quantities of grain dust and the proximity of lighted gas jets; that such dust is of a highly explosive nature and on contact with flame or spark will explode; that this was a dust explosion; that the device used by defendant to remove dust was not effective for the purpose, and that other methods, which a witness described in detail, would prevent such an explosion.

JUUL & JUUL, for plaintiff in error.

F. J. CANTY, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 195*—*when direction of verdict improper*. In an action to recover for death alleged to have been caused by defendant's negligence, where there is evidence which, if standing alone, would fairly tend to support plaintiff's case, a peremptory instruction for the defendant is error.

2. MASTER AND SERVANT, § 126*—*what degree of care required to provide safe place to work*. Reasonable care of an employer to provide a reasonably safe place to work is such care as is commensurate with the danger.

3. MASTER AND SERVANT, § 126*—*what degree of care required to guard against explosion*. Grain dust being highly explosive, an employer in whose place of work such dust is present in large quantities must exercise a degree of care commensurate with the danger to guard against explosions.

4. MASTER AND SERVANT, § 709*—*when care exercised to provide safe place to work a question for jury*. In an action to recover for the death of an employee due to an explosion of grain dust in the employer's elevator, where it appeared that there were lighted gas jets in the proximity to quantities of such dust, the question whether the employer's duty to use reasonable care to provide a reasonably safe place to work requires him to substitute another method of preventing such explosions is for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bronstein v. Shane, 195 Ill. App. 387.

**John Bronstein, Defendant in Error, v. C. B. Shane,
Plaintiff in Error.**

Gen. No. 21,229. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. GEORGE BEDFORD, Judge, presiding. Heard in this court at the March term, 1915. Reversed. Opinion filed December 6, 1915.

Statement of the Case.

Action by John Bronstein, plaintiff, against C. B. Shane, defendant, in the Municipal Court of Chicago, to recover under a contract of employment from which it was alleged he was wrongfully discharged. From a judgment for plaintiff of eighty-seven dollars, defendant appeals.

The evidence showed that plaintiff was employed as a cementer of rubber coats under a contract which provided that he "guarantees to give the same satisfaction in his work as he has heretofore been giving"; that before the contract was signed he made an average of eighteen dollars per week. The contract guaranteed that his earnings would be not less than that sum. By practically uncontradicted evidence it was shown that after the signing of the contract, with the possible exception of two weeks, he never earned this amount; that his earnings ran from ten dollars a week to about fourteen dollars a week, and that defendant paid him the difference; that the foreman reproved plaintiff for poor work, showing him defects and urging him to do better; that another employee, who was an examiner of work, found defects in the work and was compelled to return a considerable portion of the same to plaintiff to be done over; that he wasted considerable time during working hours by visiting and talking with other workmen; that he was threatened with discharge unless his work was bettered, but there was no improvement, and finally he was told to go by the fore-

Martin v. St. Luke's Hosp., 195 Ill. App. 388.

man, who stated to him that he was discharged "because I cannot get this work done at all; your work is absolutely no good."

LEWIS F. JACOBSON, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 84*—*when evidence insufficient to support judgment for wages.* In an action by a workman to recover wages alleged to be due under a contract of employment, evidence insufficient to support a judgment for plaintiff.

2. MASTER AND SERVANT, § 76*—*when discharge a defense to action for wages.* A workman who is justifiably discharged cannot recover wages after such discharge.

**Charles C. Martin, Administrator, Plaintiff in Error, v.
St. Luke's Hospital, Defendant in Error.**

Gen. No. 21,252.

1. DEATH, § 21*—*when nonaction not proximate cause.* In an action against a hospital corporation to recover for the death of plaintiff's intestate under Hurd's Rev. St., ch. 70, sec. 1 (J. & A. ¶ 6184) providing an action "whenever the death of a person shall be caused by wrongful act," etc., where it appeared that decedent was brought to defendant's hospital after a fall occurring elsewhere, with which accident the cause of death was plainly connected, and that the immediate cause of death was cerebral compression and hemorrhage, *held* that no right of action accrued to plaintiff against defendant, upon the sole ground that defendant failed to cause decedent to be operated upon in order to save his life, for the reason that the words of the statute refer to the direct cause which, without the intervention of any other cause, produces death, and do not include within their meaning a failure to arrest the natural progress of accidental injuries.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Martin v. St. Luke's Hosp., 195 Ill. App. 388.

2. EXECUTORS AND ADMINISTRATORS, § 506*—*when award of execution erroneous*. An award of an execution for costs against an administrator *held* erroneous for the reason that such costs should have been directed to be paid in the due course of administration.

Error to the Superior Court of Chicago; the Hon. M. L. McKINLEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed as modified. Opinion filed December 6, 1915.

JAMES R. WARD and ALFRED O. ERICKSON, for plaintiff in error.

SHERIFF, DENT, DOBYNS & FREEMAN, for defendant in error.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff seeks to have reversed a judgment of *nil capiat* entered on a directed verdict finding the defendant not guilty in an action of trespass on the case.

John S. Erickson, while cleaning electric lights in the passenger station of the Chicago & Northwestern Railroad, touched a live wire and received a shock which caused him to fall from a ladder. He sustained a fractured skull and other injuries. He was taken to the defendant's hospital and on the following day he died.

The theory of plaintiff's claim against defendant is that, knowing that a surgical operation was immediately necessary, the superintendent and employees of defendant "neglected to cause * * * the necessary surgical operation to be performed to arrest the effect of said injuries * * * and as a result of said injuries and the aforesaid neglect to relieve them he died," with right of action accruing under the statute for the benefit of the next of kin.

Action to recover for the death of a person is permissible only by virtue of the statute,—section 1, ch. 70, Illinois Statutes (J. & A. ¶6184). This provides

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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for an action, "Whenever the death of a person shall be caused by wrongful act," etc. It is self-evident that the cause of Erickson's death was connected with the fall from the ladder. A doctor testified that "the immediate cause of death was cerebral compression and hemorrhage." A post-mortem disclosed a blood clot on the brain about the size of a fist. We fail to see how any "failure to arrest the effect of said injuries" by surgical operation can be said to be the cause of death as these words are used in the statute. To say that the failure of a physician to prevent death is the cause of death is merely to play with words. The words in the statute mean the direct cause which, without the intervention of any other cause, produces death. We are referred to no decisions holding a defendant answerable in damages in a death case for failure to arrest the natural progress of accidental injuries.

We find no evidence of any circumstances which gave rise to an obligation upon defendant to furnish surgical services. Erickson was sent to the hospital by Dr. Owen, chief surgeon of the Chicago & Northwestern Railroad, under an arrangement between him and the defendant by which defendant was to furnish "board" and a nurse. Medical attendance apparently was to be furnished by Dr. Owen. So far as the evidence discloses, the hospital was merely a place for boarding and nursing patients under his care. There being no obligation shown by the evidence upon defendant for the services of a physician, it follows there can be no recovery against it for any failure to operate on Erickson.

These considerations are sufficient to justify the judgment, and it is unnecessary to discuss other points presented.

It was technically an error to award execution for costs against the administrator instead of the proper direction that they be paid in due course of administra-

Matousek v. Quirici, 195 Ill. App. 391.

tion. The judgment is modified here in this respect and is otherwise affirmed.

Affirmed as modified.

**Frank S. Matousek, Appellee, v. Lawrence Quirici,
Appellant.**

Gen. No. 21,267.

1. LANDLORD AND TENANT, § 14*—*when tenant under void lease liable for use and occupation.* Even though a parol lease of a building is void under the Statute of Frauds, yet the lessor may recover for use and occupation for so long a time as such use and occupation of the building continue.

2. LANDLORD AND TENANT, § 8*—*what constitutes occupancy.* In an action to recover for use and occupation of a building under a parol lease, where it appeared that defendant leased the building in question for the purpose of preventing its occupation as a fruit store in competition with that of defendant, *held* that defendant was in the use and occupation of the building so as to bind him on his oral contract except as to the term, notwithstanding the fact that defendant did not occupy such building during the period for which rent is sought to be recovered, for the reason that as defendant held the right to occupy, or to prevent others from occupying, he had an interest from month to month and thereby exercised use and occupation, in which case the actual physical presence of defendant on the premises was not necessary.

3. APPEAL AND ERROR, § 1411*—*when verdict not disturbed where evidence conflicting.* In an action to recover for use and occupation of a building under a parol lease, where the evidence was conflicting as to whether defendant gave notice of a termination of the contract, a finding that such notice was not given, *held* not erroneous because the trial court believed plaintiff's testimony to such effect.

Appeal from the Circuit Court of Cook county; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

SHORT, DAVIS & RUST, for appellant.

CHARLES A. CHURAN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Matousek v. Quirici, 195 Ill. App. 391.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit before a justice of the peace and had judgment, from which defendant appealed to the Circuit Court. Upon trial in the Circuit Court plaintiff had judgment for eighty dollars, from which defendant has appealed to this court.

After considering the variant testimony we think that the trial court might reasonably have believed that defendant ran a fruit store on 25th street in Chicago; that across the street was a vacant store; that defendant's predecessor in business had leased this vacant store and had kept it vacant so as to prevent any business competitor from occupying it; that defendant upon succeeding to the business desired to make the same arrangement with plaintiff concerning the vacant store, and that a verbal lease of it was made whereby defendant agreed to pay ten dollars a month for it; that defendant kept this store vacant and paid rent therefor for three months. This suit is for eight months' rent following the period for which defendant paid rent.

Plaintiff concedes the parol lease to be within the Statute of Frauds, but says he is entitled to recover for use and occupation of the premises, to which defendant replies that he did not have the use and occupation of the premises.

Even if the contract of leasing is void, the landlord may recover for use and occupation for so long a time as such use and occupation continue. *Warner v. Hale*, 65 Ill. 396. Was the defendant in the use and occupation of the premises? We hold that he was. The actual physical presence of the defendant on the premises was not essential. By holding the right to occupy for his own business or to prevent others from occupying he exercised use and occupation of the premises, and for such a period as he held that right he is liable.

Henning v. Quindel, 195 Ill. App. 393.

He had an interest from month to month, and until this interest was terminated he was bound by his oral contract, except as to the term. *Marr v. Ray*, 151 Ill. 340.

There is conflicting testimony as to whether or not defendant told plaintiff at the end of the three months' period for which he paid rent that he did not wish the premises for any longer time, but we cannot say that the court was not justified in believing plaintiff's testimony to the effect that no such language was used or anything said which the court might construe as a notice of termination.

Seeing no convincing reason for reversing the judgment, it is affirmed.

Affirmed.

Rose Henning, Appellee, v. Henry Quindel, Appellant.
Gen. No. 21,279.

1. **CONTRACTS, § 385***—*when evidence sufficient to show existence.* In an action to recover on a contract alleged to have been made between defendant and a third person for the benefit of plaintiff, evidence examined and *held* to prove a contract whereby defendant received money on condition that he pay the amount sued for to plaintiff, and the balance to another.

2. **CONTRACTS, § 377***—*when letters and statements admissible.* In an action to recover on a contract to deliver money made between defendant and another for the benefit of plaintiff, where it appeared that on being shown by plaintiff letters of such third person to her, stating the nature of the contract sued on, defendant said: "I have got the money, Mrs. Henning, but I cannot turn it over to you," also giving his reasons therefor, *held* that the letters were competent as was also defendant's statement after reading them, notwithstanding the fact that the letters were written by another, as tending to prove an admission by defendant of the correctness of the statements made in the letters, the attitude of defendant towards the contents of the letters making them competent.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henning v. Quindel, 195 Ill. App. 393.

3. **CONTRACTS, § 377***—*when evidence incompetent.* In an action to recover on a contract between defendant and another whereby defendant agreed to pay money to plaintiff, where it appeared that such third person had taken money from a partnership of which he was a member, evidence of money so taken *held* properly excluded, for the reason that such evidence was incompetent as having no bearing on the question of the money to be paid to plaintiff under the contract.

4. **CONTRACTS, § 349***—*when beneficiary may sue.* One for whose benefit a contract is made may maintain an action thereon although the consideration of such contract does not move from her.

Appeal from the County Court of Cook county; the Hon. J. J. COOKE, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

RATHJE & WESEMAN, for appellant; GUY VAN SCHAICK, of counsel.

NEWMAN, POPPENHUSEN & STERN, for appellee; LAWRENCE A. COHEN, of counsel.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit upon an agreement entered into between her husband, Frank Henning, and the defendant. She had judgment for \$415, from which defendant appeals.

The Farmers' Bank of Shaumburg is a private bank and a copartnership. Frank Henning was one of the copartners and the defendant also was a copartner. Henning took money of the bank to a large amount, said to be \$42,000. He was arrested in New York City and placed in the Tombs prison there, where the defendant had an interview with him for the purpose of recovering the money of the bank. The jury were justified in believing from the evidence that at this interview Henning told the defendant that he had in his possession \$2,415, that \$2,000 of this belonged to the Farmers' Bank but that \$415 belonged to his wife

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Henning v. Quindel, 195 Ill. App. 393.

(the plaintiff); that Henning gave Quindel a check for \$2,415, on condition that defendant pay \$2,000 to the bank and \$415 to his wife, and that defendant took the check subject to those conditions and agreed thereto. Subsequently, when plaintiff requested defendant to turn over to her the \$415, defendant refused. Upon one occasion plaintiff showed defendant two letters she had received from her husband which told of the arrangement with defendant to deliver to her \$415, which letters were read by the defendant, who then said: "I got the money, Mrs. Henning, but I cannot turn it over to you; I have got to wait and see what the courts decide." There was also testimony as to another admission by defendant of the aforesaid agreement with Frank Henning. The evidence was sufficient to prove a contract by defendant to give the \$415 to plaintiff.

Were the letters above referred to incompetent? They were competent together with defendant's statement after reading them, as tending to prove an admission by him of the correctness of the statements in the letters that defendant had agreed to turn over the money to plaintiff. The fact that the letters were written by the husband of plaintiff is not material. It is the attitude of defendant towards their contents which makes them competent. *Freet v. American Elec. Supply Co.*, 257 Ill. 248. See, also, *Rich v. Flanders*, 39 N. H. 304, beginning at the bottom of page 339, where appears a statement of the rule precisely in point.

It was not error to exclude evidence as to moneys taken by Frank Henning which had no bearing upon the \$415 in controversy. Other points made by defendant are equally without merit.

The plaintiff, for whose benefit the defendant made the agreement, may maintain an action although the consideration does not move from her. *Steele v. Clark*, 77 Ill. 471.

Thomas v. Seaman et al., 195 Ill. App. 396.

Plaintiff was clearly entitled to recover, and the record being free from reversible error the judgment is affirmed.

Affirmed.

Edwin S. Thomas, Appellee, v. Stephen D. Seaman and Henry A. Blair, Appellants.

Gen. No. 21,304. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Edwin S. Thomas, plaintiff, against Stephen D. Seaman and Henry A. Blair, defendants, in the Municipal Court of Chicago, to recover back money paid under a contract for land and shares of stock alleged to have been breached by defendants.

The contract was dated March 11, 1911. By it plaintiff agreed to buy and defendants to sell certain land in Colorado, and certain shares of the capital stock of an irrigation company for \$5,400, payable in four instalments, \$1,800 down, which was paid, and the balance in three instalments, the first due on or before March 11, 1912, the others in two and three years respectively. When the payment due on or before March 11, 1912, was made, plaintiff was to be "entitled to an abstract of title and to a warranty deed to said land," and the "seller agrees to furnish abstract of title and transfer said land and ditch stock as herein provided." Further provisions are:

"While buyer is not in default, he may have possession of said premises and use of water on said ditch stock until title, by deed to said land and ditch stock is delivered."

Thomas v. Seaman et al., 195 Ill. App. 396.

“If seller fails at any time to carry out the terms of this contract, then all the purchase price and the interest that has been paid at such time may be returned to buyer by seller in full accord and satisfaction of all claims of buyer hereunder.”

Also that “time shall be the essence of this contract.”

Between March 11 and April 4, 1911, plaintiff took possession of the land. On April 4, 1911, he paid the instalment due on or before March 11, 1912. Defendants did not then deliver the stock, abstract and deed, nor any of them, and made no tender until December 26, 1912, when a deed was tendered and refused. Plaintiff remained in possession of the premises from about April 4, 1911, until June, 1912, abandoning them at that time after having in April, 1912, demanded performance by defendants, saying that if the deed was not forthcoming within three days suit would be brought. Later plaintiff wrote letters indicating a willingness to buy the land at the contract price, providing defendants gave or allowed him sufficient compensation for damages caused by delay. No agreement as to such compensation was ever made. There was evidence that prior to bringing this action plaintiff had considered exchanging properties with other persons.

From a judgment for plaintiff for \$3,334.25, defendants appeal.

HOWARD M. CARTER and F. W. WALKER, for appellants.

HAASE & HOWARD, for appellee.

MR. PRESIDING JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 92***—*when delay in performance waived.* Although a contract for the sale of land may provide that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thomas v. Seaman et al., 195 Ill. App. 396.

time shall be of the essence thereof, such a condition may be waived by retaining possession of the land after the right to rescind has accrued.

2. **VENDOR AND PURCHASER, § 87***—*what acts sufficient to show rescission.* In an action to recover back money paid under a contract to purchase land, where the evidence shows that defendants failed to deliver a deed and abstract at the time of the payment of an instalment as provided by the contract, and plaintiff, about thirteen months after the time for delivery, notified defendants that if performance was not made within three days suit would be brought, and later, upon defendants still failing to perform, abandoned the land, such notice and abandonment amounted to a valid rescission of the contract, the only obligation between the parties at this time being money due and owing from defendants to plaintiff.

3. **VENDOR AND PURCHASER, § 106***—*when right to rescind not waived.* In an action to recover back money paid under a contract where plaintiff claims a rescission, letters written after the acts relied on to show a rescission expressing a willingness to purchase the property if defendants gave or allowed compensation for damages resulting from their delay in performing, *held* insufficient to prove either a waiver of rescission or a want of intention to rescind, it nowhere appearing that the amount of compensation to be paid was ever agreed on.

4. **VENDOR AND PURCHASER, § 106***—*when evidence insufficient to show retraction of rescission.* In an action to recover back money paid under a contract to purchase land where plaintiff had effectively rescinded, and where defendants were urging plaintiff to come to some agreement as to the controversy, the fact that plaintiff discussed with third persons an exchange of the property in question for property belonging to them, *held* not sufficient to show a waiver of the rescission, as the terms which plaintiff might be willing to make with defendants might depend on what disposition he could make of it.

5. **CUSTOMS AND USAGES, § 16***—*what effect of custom as to actual delivery of stock certificates.* In an action to recover back money paid under a contract to purchase land and stock of a Colorado ditch corporation, the fact that no certificates of the stock were ever tendered, *held* immaterial where it appears that both by the contract and the method of handling such matters in Colorado no actual delivery of stock was contemplated by the parties.

6. **VENDOR AND PURCHASER, § 123***—*when vendor required to furnish abstract and deed in reasonable time.* Where a contract to purchase land provides that the vendee shall be entitled to an abstract of title and a deed on making certain payments, such abstract and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Chicago v. Kohn, 195 Ill. App. 399.

deed must be furnished within a reasonable time after such payments were made.

7. **VENDOR AND PURCHASER, § 123***—*what delay in furnishing abstract and deed unreasonable.* Where a contract to sell land is construed to require grantors to furnish an abstract of title and deed within a reasonable time after certain payments were made, a delay of one year and eight months in making tender of such deed and abstract *held* unreasonable.

**City of Chicago, Defendant in Error, v. Louis Kohn,
Plaintiff in Error.**

Gen. No. 20,681. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Prosecution by the City of Chicago against Louis Kohn, defendant, in the Municipal Court of Chicago, for a breach of the peace. To reverse a judgment of conviction and sentence of a fine of one hundred dollars, defendant prosecutes this writ of error.

WILLIAM E. CLOYES, for plaintiff in error.

JOHN W. BECKWITH and A. J. W. APPELL, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

EVIDENCE, § 10*—*when judicial notice not taken of ordinances.* On a writ of error bringing up for review a judgment of conviction rendered by the Municipal Court of Chicago on a complaint charging the violation of an ordinance, where the stenographic report merely gives the number of the ordinance alleged to have been violated and does not set it out, the Appellate Court cannot review the question of the sufficiency of the evidence to sustain the judgment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

wski v. Pozdol, 195 Ill. App. 400.

**Majewski, Appellant, v. Stanislaus Pozdol et al.,
Appellees.**

Gen. No. 20,988.

1. **APPEAL AND ERROR, § 633***—*when appeal from refusal to vacate decree may be allowed.* An appeal from the denial of a motion to vacate a decree may be allowed at a term later than that at which the decree was actually entered, provided such motion was made at such prior term and was continued to the term when the appeal was taken, for the reason that a judgment or decree does not become final until disposition is made of a motion to vacate such judgment or decree, if made at the term when the judgment or decree was entered, although such motion may be continued to a later term.

2. **APPEAL AND ERROR, § 1197***—*when review limited to order appealed from.* An appeal from a decree dismissing a bill for want of prosecution and assessing damages on dissolution of an injunction brings up for review only that part of the decree assessing damages and does not bring up the question of dismissal of the bill where neither the prayer for appeal nor the bond show an appeal from the decree dismissing the bill.

3. **INJUNCTION, § 324***—*when suggestion of damages essential on dissolution.* It is error for a court to hear evidence and assess damages on the dissolution of an injunction without the filing of a suggestion of damages, a suggestion of damages being necessary to give such court jurisdiction to act on such questions.

4. **INJUNCTION, § 324***—*when evidence insufficient to show filing of suggestion of damages.* Where on dismissing a bill and dissolving an injunction the court heard evidence and assessed damages, evidence examined and *held* insufficient to show that a suggestion of damages had been filed.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1915. Decree modified. Opinion filed December 6, 1915.

WILLIAM J. STAPLETON and A. Z. ZIETLEIN, for appellant.

DAVID GILMOUR, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

The bill in this case was filed by Majewski against Pozdol to vacate the default of Majewski and the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Majewski v. Pozdol, 195 Ill. App. 400.

decree against him entered November 25, 1910, on a creditor's bill filed by Pozdol against him and others, whereby certain real estate, of which Majewski in his bill claimed to be the owner, was decreed to be the property of one George W. Chamberlin, and ordered to be sold to satisfy a judgment recovered in an action for fraud and deceit by Pozdol against the administrator of George W. Chamberlin, to be paid in due course of administration, and a personal judgment against Emma R. Chamberlin. The propriety of a judgment against a surviving tortfeasor and the personal representative of a joint tortfeasor is not brought before us for review by this appeal. The court in the case mentioned decreed that the real estate in question be sold by a master to satisfy the judgment, and it was sold under the decree January 30, 1911, to Pozdol.

The master's report of sale was confirmed and a certificate issued to the purchaser. August 24, 1911, the bill in this case was filed and the defendant enjoined from taking out a master's deed. Pozdol answered the bill; a replication was filed and the cause was in the call of July 3, 1914, for hearing. It was reached that day and the complainant did not appear. The bill was dismissed for want of prosecution, and the court immediately proceeded to hear evidence as to the damages of defendant sustained by reason of the injunction, and directed counsel to prepare a decree. The decree was entered July 9th. July 8th complainant moved the court to vacate the order dismissing the bill for want of prosecution. The decree orders that the bill be dismissed for want of prosecution; finds that defendant was wrongfully deprived of the profits of the premises for two years and eight months, and sustained damages thereby to the amount of \$700; decrees that "a judgment be entered for the amount of \$700 as damages," etc.; and further finds that defendant was compelled to pay and did pay \$150 solicitor's fees

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in obtaining the dissolution of the injunction and orders that "a judgment for damages be entered against complainant" for \$150, etc.

The decree was entered at the June term. July 18th, the last day of that term, the complainant moved to vacate the decree entered July 9th, and the court continued the hearing of the motion to August 18, 1914. The August term began August 17th, and August 18th, a day of the August term, the plaintiff moved to vacate so much of the decree entered July 9th as assessed damages against complainant for the wrongful suing out of the injunction in the case, and the court denied the motion. The complainant prayed an appeal, "from the order of the court denying said motion," and "from the decree assessing damages for the suing out of said injunction," which was allowed on the complainant filing a bond, etc.

The bond recites that "whereas, Pozdol recovered a decree against Majewski July 9, 1914, for \$850 and costs, from which decree and from an order entered August 18, 1914, denying a motion to vacate same, Majewski has prayed for and obtained an appeal to the Appellate Court; Now therefore," etc.

It appears to be well settled by the later decisions of our Supreme Court that if at the term at which a judgment or decree is entered a motion is made to set aside the same, the judgment or decree does not become final until such motion is disposed of, even though the motion is continued to a subsequent term. *Grubb v. Milan*, 249 Ill. 456; *Hosking v. Southern Pac. Co.*, 243 Ill. 320; *Donaldson v. Copeland*, 201 Ill. 540; *Village of Hinsdale v. Shannon*, 182 Ill. 312; *People v. Gary*, 105 Ill. 264; *Hearson v. Graudine*, 87 Ill. 115.

It is true that most of the cases above cited presented the question of right of the judge to sign at a subsequent term a bill of exceptions containing the evidence heard at the trial. The appeal must be prayed at the term at which the judgment or decree is rendered.

The bill of exceptions must be signed at the judgment term unless an order is made allowing further time, and if the bill of exceptions may be signed at a subsequent term on the ground that the judgment does not become final until the motion to vacate made at the judgment term is disposed of, it follows that an appeal in such case may be allowed at the subsequent term on the ground that the judgment does not become final until the motion to vacate is disposed of; and therefore the judgment must be regarded as entered at the subsequent term. This appeal therefore brings before us for review that part of the decree which "assessed damages for the suing out of the injunction," but not that part of the decree which dismisses the bill for want of prosecution, because the prayer for an allowance of the appeal and the appeal bond fail to show an appeal from the decree dismissing the bill.

To confer jurisdiction on a court to hear evidence and assess damages on the dissolution of an injunction, a suggestion of damages should be filed, and it is error to assess damages without such suggestion.

Hamilton v. Stewart, 59 Ill. 330; *Forth v. Town of Xenia*, 54 Ill. 210; *Winkler v. Winkler*, 40 Ill. 179. The rule is different in an action on the bond. *Shackleford v. Bennett*, 237 Ill. 523.

The evidence fails, in our opinion, to show that the defendant filed a suggestion of damages in writing before the damages were assessed. The decree orders, paragraph 1, that the case be dismissed for want of prosecution at complainant's costs; paragraph 2, that complainant's bill and the amendments thereto be dismissed and judgment entered for damages and costs; paragraphs 3 to 6 recite facts to show that defendant sustained damages by reason of the injunction. The certificate of evidence recites that the bill was dismissed for want of prosecution, and "thereupon the defendant at once moved the court to assess damages for the suing out of the injunction in said

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cause, which motion was granted, and immediately following evidence in support thereof was heard." Defendant called as a witness his son, Michael, who in answer to the question whether he saw Mr. Gilmour, one of defendant's counsel, pass up a paper that he said was a suggestion of damages, answered, "If my memory serves me right, I have." In answer to another leading question by complainant's counsel, as to whether there were two documents "put over" to the clerk by Mr. Gilmour, the witness said, "If my memory serves me right, I have." Asked on cross-examination to pick out from the files the two papers, he picked out one which was a motion for leave to file a suggestion of damages, and another which was the decree, which manifestly was not prepared until later. J. W. Richey, Esq., who had had charge of the case up to the hearing, and who was present at the hearing, was called by the court and testified that he saw no written suggestion of damages presented to the court at any time. Mr. David Gilmour, defendant's solicitor, filed an affidavit in which he stated that two papers offered with his affidavit were copies of a petition for leave to file a suggestion of damages and a suggestion of damages. The suggestion of damages presented with the affidavit does not purport to be signed by any one; there was no motion to restore lost files or documents and there is in the record no suggestion of damages in writing. It was error to assess damages by reason of the injunction before a suggestion of damages was filed, and for this error that part of the decree which assesses damages by reason of the injunction will be reversed. That part of the decree which dismisses the bill is not, as we have said, brought before us by this appeal.

That part of the decree assessing damages against defendant by reason of the injunction is reversed at the cost of the appellee.

Decree modified.

Price v. Chicago R. E. I. Co., 195 Ill. App. 405.

Ike Price, Plaintiff in Error, v. Chicago Real Estate Index Company, Defendant in Error.

Gen. No. 21,130. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Ike Price, plaintiff, against the Chicago Real Estate Index Company, defendant, in the Municipal Court of Chicago, to recover damages due to defendant's negligence in giving plaintiff incorrect information as to the ownership of certain real estate whereby plaintiff lost an opportunity of satisfying a judgment. To reverse a judgment for defendant, plaintiff prosecutes this writ of error.

The defendant furnished, for pay, information to its customers regarding the ownership of real estate. Plaintiff recovered in the Municipal Court against one H. Galowich a judgment for \$400, December 10, 1913, and through his attorneys on that day inquired of defendant by telephone if Galowich was the owner of the real estate known as No. 3431 W. 38th Place, Chicago. Some one in defendant's office answered by telephone that Galowich was not the owner of said real estate, but one Zuitman was. The attorney asked for a written report and received it the next day. It is stated that Zuitman was the owner of real estate subject to a trust deed from Zuitman to Haugan, trustee, recorded August 16, 1912, to secure \$2,500 due in various amounts during five years. The report bore the following memorandum:

“In furnishing the above information the company assumes no pecuniary liability to the applicant except in case of special written notice that same is to be used in a legal proceeding, in which case an additional fee must be paid, and this report must be signed by an authorized agent of the company.”

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One of plaintiff's attorneys testified that it was the custom of defendant in its dealings with them to confirm the telephone conversation by such written reports. Plaintiff put in evidence another report sent to his attorneys by defendant, from which it appears that the real estate was conveyed to Zuitman by a deed recorded June 9, 1911; that August 15, 1912, he executed a trust deed to Haugan, trustee, to secure \$2,500, which was recorded August 16, 1912; that he conveyed the property to Galowich by deed recorded March 15, 1913, and that Galowich conveyed it to Jacobson by deed recorded January 4, 1914. Defendant was not notified that the information was to be used in legal proceeding, and the report was not signed by an authorized agent of the defendant. The only evidence regarding the title to the real estate was the two reports made to plaintiff by defendant. Each showed a trust deed to Haugan executed by Zuitman, recorded August 13, 1912, to secure \$2,500. The first report stated that the Board of Review valued the property at \$200 for taxation, which was the only evidence in the record tending to show the value of the property. The second report stated that Zuitman conveyed the property to Galowich by deed recorded March 15, 1913, and that he conveyed it to Jacobson by deed recorded January 8, 1914. It also showed a certificate of levy on an execution against Galowich and that a satisfaction piece was filed, but did not show that the property was sold under the execution against Galowich.

WINSTON & LOWRY, for plaintiff in error.

BITHER, GOFF & FRANCIS, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 245*—*when failure to comply with condition defense to action for breach.* In an action to recover for damages

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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due to defendant's negligence in giving plaintiff incorrect information as to the ownership of real estate, whereby plaintiff lost an opportunity of satisfying a judgment, where it appeared that defendant was in the business of supplying such information for hire, and where the written report conveying such information contained a stipulation excusing defendant from pecuniary liability to plaintiff in furnishing the information except on certain conditions, *held* that the stipulation as to liability was part of the contract, and that the conditions named must be complied with to charge defendant with liability.

2. CONTRACTS, § 384*—*when evidence insufficient to show damages from breach.* In an action to recover for damages due to defendant's negligence in giving plaintiff incorrect information as to the ownership of real estate, whereby plaintiff lost an opportunity to satisfy a judgment evidence, *held* insufficient to show that plaintiff was damaged.

John Hemwall Automobile Company, Plaintiff in Error, v. Michigan Avenue Trust Company, Defendant in Error.

Gen. No. 21,149.. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN D. TURNBAUGH, Judge, presiding. Heard in this court at the March term, 1915. Reversed with judgment here. Opinion filed December 6, 1915.

Statement of the Case.

Action by the John Hemwall Automobile Company, a corporation, plaintiff, against the Michigan Avenue Trust Company, a corporation, defendant, to recover back money paid on a contract for the purchase of automobiles. To reverse a judgment of *nil capiat*, plaintiff prosecutes this writ of error.

May 27, 1913, plaintiff and the Midland Motor Company entered into a written contract whereby the motor company agreed to sell and deliver to plaintiff six auto-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hemwall Auto. Co. v. Michigan Ave. Tr. Co., 195 Ill. App. 407.

mobiles, Model T-6-50, "fully equipped as per catalogue" at \$1,400 each, and to deliver one car by May 29th and the others within two weeks from the date of the contract; and the defendant agreed to pay for said cars, "fully equipped as per catalogue and covered in this agreement \$600 cash upon signing of this agreement; this amount being a deposit of \$100 on each of the six cars; it being mutually understood that we are to deduct \$100 from the net price of each car as delivered, making a balance due of \$1,300 on each car delivered." The defendant took over the contract and undertook its performance. It delivered two cars to plaintiff for which the latter paid, but complained that the cars so delivered were not equipped as required by the contract, and notified defendant that it would not accept other cars until they were fully equipped as required by the contract. The defendant tendered four cars, but plaintiff refused to accept them on the ground that they were not equipped as required by the contract. The defendant then sold the cars for \$1,300 each and claimed on the trial the right to set off the \$100 difference on each car between the contract price and the price at which the cars were sold, against the claim of plaintiff for the \$400 deposited as an advance payment on the four cars.

It was conceded that the cut in the catalogue, purporting to be a cut of the automobile specified in the contract, shows six rims and six tires on each car and a gas tank on the rear of the car, and that the cars delivered and those tendered did not have six rims or six tires. White, a witness called by defendant, testified that the automobiles tendered were not equipped according to pictures and cuts in the catalogue. The specifications in the catalogue do not specify the number of tires or rims.

The cashier of defendant in a letter to plaintiff dated July 1, 1913, said: "Mr. Sackett (an employee of defendant) advises that the next car you receive is to

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be delivered without tires, in view of the fact that you had to equip the last one you sold with Firestone tires; we will therefore make a reduction covering the cost of a set of tires from the price of the car.”

CAVENDER, KAISER & WERMUTH, for plaintiff in error.

BROWN, BROWN & BROWN, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 224*—*how stipulation as to equipment of automobile construed.* Where a contract for the purchase of automobiles “fully equipped as per catalogue,” and where a cut purporting to be a cut of the type of car contracted for which was printed in said catalogue shows a particular equipment of tires and rims, the cars tendered in performance of the contract must be similarly equipped, although the printed specifications for such cars in such catalogue do not require such equipment, the cuts being as much part of the catalogue as the specifications.

2. CONTRACTS, § 387*—*when evidence insufficient to show performance.* In an action to recover back money paid under a contract for automobiles “fully equipped as per catalogue,” where plaintiff refused to accept cars tendered in performance of the contract on the ground that such cars were not as required by the contract, evidence held insufficient to show that the cars tendered were equipped as required by the contract.

B. J. Grogan, Defendant in Error, v. Consumers Company, Plaintiff in Error.

Gen. No. 21,163. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN COURTNEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410.

Statement of the Case.

Action by B. J. Grogan, plaintiff, against the Consumers Company, a corporation, defendant, in the Municipal Court of Chicago to recover damages caused to an automobile by the negligence of a servant of defendant while driving a wagon. Plaintiff was driving east on Jackson boulevard, and defendant's wagon was going east on Loomis street. The tongue of the wagon struck the automobile and inflicted the damage complained of. To reverse a judgment for plaintiff of \$96.25, defendant prosecutes this writ of error.

McKINLEY & HANSEN, for plaintiff in error.

P. J. TUOHY, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

AUTOMOBILES AND GARAGES, § 2*—*when evidence supports findings as to negligence.* In an action to recover for injury to plaintiff's automobile alleged to have been caused by negligence of the driver of defendant's wagon, evidence held to sustain a finding that plaintiff was not guilty of contributory negligence and that defendant's driver was negligent.

L. W. Hubbell Fertilizer Company, Defendant in Error, v. D. Jacobellis, Plaintiff in Error.

Gen. No. 21,184. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915. Rehearing denied December 20, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410.

Statement of the Case.

Action by L. W. Hubbell Fertilizer Company, a corporation, plaintiff, against D. Jacobellis, defendant, in the Municipal Court of Chicago, to recover on a guaranty by defendant of the debt of another. To reverse a judgment for plaintiff for \$467.75, defendant prosecutes this writ of error.

April 16, 1914, an order to plaintiff to ship twenty tons of fertilizer to Joe Ogden, signed by Ogden and the Indiana Colonization Society by defendant as president, was forwarded to plaintiff at its office in Buffalo, New York. April 21st plaintiff sent defendant the following telegram: "Buffalo, N. Y., April 21, 1914. D. Jacobellis, 832 W. Ohio St., Chicago. Care Jacobellis Bros. Indiana Colonization Co. not rated, will you personally guarantee payment twenty tons fertilizer ordered? Answer collect. L. W. Hubbell Fertilizer Co." The defendant testified that he received this telegram and threw it on the desk. The same day plaintiff received at Buffalo the following telegram: "Chicago, April 21, 1914. L. W. Hubbell Fertilizer Co., Buffalo, N. Y. I will personally guarantee payment 20 tons fertilizer ordered by Indiana Colonization Co. D. Jacobellis." Defendant testified that he had never sent or caused to be sent to the plaintiff any telegram in relation to any matter. The original of the telegram of April 21st, purporting to be a telegram of defendant to plaintiff, was produced at the trial by an officer of the telegraph company, and certain letters and documents signed by the defendant, which he admitted that he signed, were put in evidence. The original of the telegram was marked, "Exhibit 3" for identification, and Wells, a witness for plaintiff, testified that the signature to the telegram was the signature of the defendant. The defendant admitted the receipt of the telegram from plaintiff of April 21st.

L. W. Hubbell Fertilizer Co. v. Jacobellis, 195 Ill. App. 410.

CAIBOLI GIGLIOTTI, for plaintiff in error.

ALLEN G. MILLS, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 903***—*when original document not contained in record considered as in evidence.* In an action to recover on a guaranty where the guaranty was made by telegram, and where the original of the telegram constituting the guaranty in question was not contained in the record, on review the Appellate Court will treat the telegram as being in evidence, it appearing that such original was produced in the trial court, identified, and testimony introduced concerning it.

2. **EVIDENCE, § 304***—*what authentication of original of telegram sufficient.* The original of a telegram received by plaintiff and purporting to be signed by defendant is made competent by the testimony of a witness that the signature is that of defendant.

3. **EVIDENCE, § 304***—*when signing of telegram a question of fact.* The question whether the original of a telegram alleged to have been sent by a party is signed by him is a question of fact.

4. **CONTRACTS, § 4***—*when written contract may be made by telegram.* Contracts required to be written may be validly made by telegram.

5. **EVIDENCE, § 304***—*when telegram received in answer to another telegram presumed genuine.* The rule applicable to letters received in the due course of mail purporting to be in answer to a letter previously sent by the receiver, that such letters are presumptively genuine and admissible, is equally applicable to telegrams similarly received, a presumption arising in each case that the letter or telegram of the receiver was duly forwarded and received by the addressee, and that the answer received was sent by the addressee.

6. **APPEAL AND ERROR, § 378***—*when defense not raised in trial court waived.* The defenses of *res adjudicata* and want of consideration are not available in the Appellate Court where such defenses were not raised in the trial court.

7. **GUARANTY, § 30***—*where recovery may be had against principal and guarantor in separate actions.* Although a plaintiff may recover against a principal in one action and against the guarantor in another, he can have but one satisfaction of the debt guarantied.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Williams v. Veeder, 195 Ill. App. 413.

8. GUARANTY, § 2*—*when guaranty binding when executed before delivery of goods.* A guaranty is binding where the goods are contracted for by the principal one day and the guaranty is executed the next and delivered to the seller before the goods are delivered, for the reason that the sale is not complete until delivery of the goods.

**George J. Williams, Plaintiff in Error, v. J. C. Veeder,
Defendant in Error.**

Gen. No. 21,205. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the March term, 1915. Reversed and remanded. Opinion filed December 6, 1915.

Statement of the Case.

Action by George J. Williams, plaintiff, against J. G. Veeder, defendant, in the Municipal Court of Chicago, to recover rent due under a lease. To reverse a judgment for defendant, plaintiff prosecutes this writ of error.

The term stated in the lease was one year from May 1, 1913, with the provision that "if said lessee does not give said lessor written notice sixty days prior to the expiration of this lease of his intention to vacate said premises at the expiration of the term hereby granted, the failure to give such notice shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor." The lessee did not give notice of his intention to vacate. The *habendum* clause in the lease is as follows: "To have and to hold the above described premises with appurtenances unto the said lessee from the first day of May A. D. 1913, until the 30th day of April A. D. 1914, except as hereinafter provided."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Williams v. Veeder, 195 Ill. App. 413.

Defendant vacated the premises April 30, 1914, and the lease provided that in case he should vacate, the same might be relet by the lessor for such a rent and upon such terms as he might see fit, and if a sufficient sum should not be thus realized to satisfy the rent thereby reserved, the lessee agreed to satisfy and pay the deficiency. Plaintiff was not able to rent the premises until June 15th.

CHARLES S. WILLISTON, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 431*—*when provision for extension of lease by lessor not covenant.* A lease demising premises for the term of one year which also provides that if lessee shall fail to notify lessor sixty days before the end of the term of his intention to vacate at the end thereof, shall, at the option of lessor, operate to extend the term for a further period of one year, such provision is a present demise in case such notice is not given, and on the exercise of the option by lessor, the legal effect thereof is the same as though the lease in express words had embraced a term of two years, and it is not merely a covenant specifically enforceable in equity or on which an action at law is maintainable.

2. LANDLORD AND TENANT, § 434*—*when commencement of action for rent by landlord election to renew lease.* Where a lease for one year provides that the failure of lessee to give certain notice shall at the option of lessor operate to extend the term of the lease for a further period of the same length, the fact that lessor brings an action to recover for rent due under the lease as so extended is an election by him to treat the lease as being renewed for the further term, it appearing that the notice required was not given.

3. LANDLORD AND TENANT, § 432*—*when consideration exists for extension of lease by failure to give notice.* Where a lease for one year provided that the failure of lessee to give certain notice should operate at the option of lessor to extend the term of the lease, the same consideration which supports other provisions of the lease will

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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support the condition that failure to give the notice provided for should extend the lease, for the reason that the contract was entire.

4. LANDLORD AND TENANT, § 284*—*when lessee liable for rent upon abandonment of premises.* Where a lease provided that in case lessee should vacate before the end of the term the lessor might relet the premises on such terms as he should see fit, in which case the lessee would be liable to make good the deficiency, *held* that lessor could recover rent for the period during which he was unable to rent the premises, it appearing that lessee vacated before the end of the term.

5. LANDLORD AND TENANT, § 431*—*when tenant bound by lease providing for extension of term.* In an action to recover rent due under a lease containing a provision that failure of defendant to give certain notice should at the option of plaintiff operate to renew the lease for a further term of the same length, where it appeared that the amounts sought to be recovered were for rents accruing during the term as extended, a peremptory instruction for defendant *held* erroneous, it also appearing that defendant failed to give the notice required, and that plaintiff exercised his option to treat the lease as extended for a further term.

**The People of the State of Illinois ex rel. Mary Volska,
Defendant in Error, v. Vincent Murphy, Plaintiff
in Error.**

Gen. No. 21,250. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois *ex rel.* Mary Volska against Vincent Murphy, defendant, in the Municipal Court of Chicago, in which defendant was charged with bastardy. To reverse a judgment of conviction, defendant prosecutes this writ of error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

People v. Murphy, 195 Ill. App. 415.

Defendant pleaded the statute of limitations. The evidence showed that the child was born May 20, 1911; that a warrant in the bastardy proceeding was issued October 30, 1911, but complainant was unable to serve the warrant and the proceeding was abandoned. The complaint in the present case was filed January 21, 1915. The defendant when in Chicago lived with his mother at 92nd street and Buffalo avenue. The relator testified that defendant remained in Chicago up to about the 22nd of September; that he left about October 30, 1911, and she did not see him nor know where he was until September, 1914. The Secretary of the Court of Domestic Relations testified that she went to the neighborhood of 92nd street and Buffalo avenue two or three times a week from the time the child was born to September, 1914, and did not see defendant at any place in Illinois during that time. The witness was not cross-examined nor did defendant offer any testimony to explain or contradict the testimony given for the prosecution.

JOHN CURTIN, for plaintiff in error; CHAUNCEY N. CLEMENTS, of counsel.

MACLAY HOYNE and ELMER J. SCHNACKENBERG. for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 45*—*what constitutes prima facie proof.* Prima facie proof or evidence is that which, standing alone, unexplained or uncontradicted, is sufficient to maintain the proposition affirmed, and if not rebutted will be sufficient for that purpose.

2. BASTARDS, § 22*—*where evidence sufficient to establish prima facie case.* In a prosecution for bastardy, where defendant pleaded the statute of limitations (Hurd's Rev. St., ch. 17, sec. 16, J. & A. § 718), providing that "no prosecution under this Act shall be brought

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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after two years from the birth of the bastard child: *Provided*, the time any person accused shall be absent from the State shall not be computed," a finding and judgment of conviction *held* not erroneous, where there was evidence sufficient to prove prima facie that defendant was absent from the State for a period sufficient to prevent the statute from being available in defense, and where defendant offered no evidence to contradict or rebut such prima facie proof.

Liberty & Company, Defendant in Error, v. The Almini Company, Plaintiff in Error.

Gen. No. 20,506. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by Liberty & Company, a corporation, plaintiff, against the Almini Company, a corporation, defendant, in the Municipal Court of Chicago, to recover for merchandise sold and delivered. That there was an agreement as to the amount of the claim was denied only by Stewart, the president of defendant company. Aside from that it was clear that on the amount agreed upon by Stewart as due, defendant paid the sum of \$400 twice, and the balance of the sum due is the amount of the judgment. Defendant sent a letter transmitting a check of \$400 on account saying that the check was sent as promised. One Voorhees testified that there was an agreement as to the amount due and an agreement of Stewart to pay the same. In an account appearing in the claim of plaintiff and in some amendments thereto the amounts were stated in francs and centimes, but the American equivalents for the French money were also stated. To reverse a

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judgment for plaintiff for \$246.65, defendant prosecutes this writ of error.

GEORGE W. WILBUR, for plaintiff in error.

HOYNE, O'CONNOR & IRWIN, for defendant in error;
CARL J. APPELL and HEYMANN F. TUCKER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CORPORATIONS, § 597*—*how far succeeding corporation liable for predecessor's debts.* The liability of defendant corporation for the obligations of a former corporation which it succeeded and the relations of individuals thereto, *held* to have been settled in *Quinlan v. Almini Co.*, 191 Ill. App. 568.

2. PLEADING, § 1*—*when use of foreign words immaterial.* In an action to recover for goods sold and delivered, where it appears that an account contained in plaintiff's pleadings stated the amount due plaintiff in terms of francs and centimes is not an infraction of the constitutional requirement that all court proceedings shall be in the English language, notwithstanding the fact that such statement would be a statement of French money, for the reason that defendant could not have been misled thereby, especially where the same pleading also shows the American equivalent for such French money, and where it does not appear that the statement of such equivalent was incorrect.

3. SALES, § 329*—*when evidence sustains recovery.* In an action to recover for goods sold and delivered, evidence examined and a finding and judgment for plaintiff *held* sustained by the evidence.

**Louis Friedman, Defendant in Error, v. Schreiber
Brothers Company, Plaintiff in Error.**

Gen. No. 20,538. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Action by Louis Friedman, plaintiff, against the Schreiber Brothers Company, a corporation, defendant, in the Municipal Court of Chicago, to recover on a contract of employment, executed by both parties to the action, which was in the following words:

“Memorandum of agreement made this 21st day of August, 1912, by and between Louis Friedman, of the City of Chicago, County of Cook and State of Illinois, party of the first part, and Schreiber Brothers Co., a corporation, duly organized under the laws of the State of Illinois, party of the second part, witnesseth:

“That the said party of the second part hereby employs the said party of the first part in the capacity of Foreman, Rectifier and Supervisor of the business of said corporation, for which said corporation agrees to pay said party of the first part for such services the sum of Twenty-seven Dollars and Fifty Cents (\$27.50) every week, said payments to begin on September 1st, 1912, and every week thereafter to September 1st, 1913; and the sum of Thirty Dollars (\$30.00) every week beginning from September 1st, 1913, to September 1st, 1914; all of above mentioned payments are to be made on Friday of each week.

“The said party of the first part agrees during the time of this contract not to engage in any other line of business, and shall receive two weeks vacation each year with full pay.”

Plaintiff was discharged by defendant December 10, 1913, without cause, and received, substantially, payment at the rate fixed by the contract to the time of such discharge. He was again employed February 14, 1914.

Defendant tendered to the court propositions of law to the effect that the contract was void for want of mutuality and indefiniteness, and that it was terminable at defendant's pleasure, and that therefore plaintiff could recover only for the time he actually worked.

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To reverse a judgment for plaintiff for \$500, defendant prosecutes this writ of error.

HARRY G. WEXLER, for plaintiff in error; HYMAN SOBOROFF, of counsel.

DULSKY & DULSKY, for defendant in error; EDWARD H. TAYLOR, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 3*—*when contract not void*. In an action to recover on a written contract of employment, contract construed and propositions of law to the effect the contract was void for want of mutuality and indefiniteness *held* properly rejected by the trial court as not correctly stating the law of the case.

2. MASTER AND SERVANT, § 14*—*when contract not determinable at will*. In an action to recover on a written contract of employment, contract construed and *held* that a proposition of law to the effect that the contract was terminable at the pleasure of defendant, and that plaintiff could recover only for the time he worked thereunder, was properly rejected as not correctly stating the law of the case.

3. MASTER AND SERVANT, § 14*—*when contract construed as for definite period*. A contract providing that plaintiff shall be employed by defendant and requiring defendant to pay to plaintiff for his services a stated sum each week, commencing at a named date and continuing thereafter until a named date, is susceptible only of the construction that the term of such contract is intended to be two years, where it appears that the mutual covenants of the contract continue over a period of two years, although such period is nowhere therein stated as the term thereof, since equivalent words are found in such contract.

4. MASTER AND SERVANT, § 14*—*when terms employed indicate contract for definite period*. Where a contract of employment does not in express words state the term during which the contract is to operate, but provides for a series of payments to be made each week without interruption during a period which is in fact two years, and which also provides that plaintiff "is to have two weeks

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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vacation in each year with full pay," *held* that there was no ambiguity in the contract, "each year," as used therein meaning "each year" of a two years' contract.

Davella Martin, Appellant, v. Illinois Commercial Men's Association, Appellee.

Gen. No. 20,823.

1. **INSURANCE, § 667***—*when medical testimony not discredited by testimony of plaintiff.* In an action to recover on a policy of accident insurance wherein plaintiff, the wife of deceased, was named as beneficiary, plaintiff cannot be heard to discredit a medical witness of defendant who testifies that deceased's death was caused by fatty degeneration of the heart, superinduced by chronic alcoholism, where it appears that plaintiff previously had secured a divorce from deceased on the ground of drunkenness, in which action she testified and procured others to testify that deceased was an habitual drunkard, and where it appears that such decree of divorce was granted on the faith of the verity of such testimony.

2. **INSURANCE, § 667***—*when evidence insufficient to show accidental death.* In an action to recover on a policy of accident insurance conditioned to pay to the beneficiary named therein a sum of money "in case of bodily injury or injuries received through violent and accidental means, which shall independently of all other causes result in the death" of insured, where the only evidence of an accident was that deceased arose in the night exclaiming, "Oh, my God!" and falling, struck a chiffonier resulting in cuts of the lip and nose, with profuse bleeding, a peremptory instruction for defendant *held* not erroneous, there being medical testimony that the cause of deceased's death was fatty degeneration of the heart superinduced by chronic alcoholism, and where it appeared that deceased told a physician that he had heart trouble and carried strychnine to stimulate his heart action.

3. **INSURANCE, § 667***—*when evidence insufficient as to cause of death.* In an action to recover on a policy of accident insurance conditioned to pay a sum of money to the beneficiary named therein in case insured came to his death "through violent and accidental means, independently of all other causes," where there was evidence that the cause of death was fatty degeneration of the heart super-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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induced by chronic alcoholism, evidence *held* insufficient to prove that deceased's death was the result of an accident within the meaning of the policy, the only evidence of an accident being that deceased fell and received cuts, although such fall may have hastened the death, for the reason that such evidence is insufficient in its probative value to establish the fact that deceased's death was caused by the fall "independently of all other causes" without which proof there could be no recovery on the policy.

4. INSURANCE, § 436*—*what is effect of failure to furnish proofs of death.* Where in a policy of insurance the by-laws of the company are made part thereof, and where a by-law requires as a condition precedent to recovery thereunder that proofs of death be presented to the company within a named time, a failure to present such proofs within the time fixed by such by-law will preclude recovery unless there is a waiver of such condition.

5. INSURANCE, § 120*—*how policy construed.* Since contracts of insurance are to be construed like other contracts, an ambiguous insurance contract will by construction be given the meaning more favorable to insured, for the reason that the words are the words of the insurer and therefore any ambiguity is chargeable to it, but where the contract is not ambiguous, neither party will be favored by construction.

6. CONTRACTS, § 165*—*when provisions enforced notwithstanding hardship.* Where a stipulation in a contract is lawful and has not been actually or inferentially waived, the courts will enforce the stipulation as made and cannot avoid a hardship resulting from the enforcement of rigorous and inflexible terms by making a new contract for the parties.

7. INSURANCE, § 460*—*when delay in sending blank form of proofs of death not a waiver thereof.* Where a policy of insurance as a condition precedent to recovery thereunder required that proofs of death be presented to insurer within a named time, the fact that insurer delayed sending blanks for such proof when requested has no tendency to prove a waiver of the condition, where neither the terms of the contract nor the law require insurer to furnish such blanks.

8. INSURANCE, § 452*—*when insurer not estopped to assert failure to furnish proofs of death.* In an action to recover on a policy of insurance which, as a condition precedent to recovery that proofs of death be presented to insurer within a named time, and where no fraud is shown in the delay of insurer to furnish blanks for such proof, insurer is not estopped to insist on the condition for the reason that where fraud is absent there can be no estoppel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9. INSURANCE, § 439*—*when mailing proofs of death not a compliance with by-laws.* Where a policy of insurance made the by-laws of insurer a part of the contract and where such by-laws required as a condition precedent to recovery that proofs of death be *presented* to insurer within a named time, mailing such proofs to insurer, *held* not a presentment within the meaning of the by-law, although such proofs were mailed within the time fixed thereby.

Appeal from the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed December 6, 1915.

JOHN A. BROWN, for appellant.

RYAN & CONDON, for appellee; IRVIN I. LIVINGSTON and D. A. CALLAHAN, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This is an action on an accident insurance policy for \$5,000 issued by defendant upon the application of one James W. Martin, in which plaintiff, his wife, was named as beneficiary. The court, upon the conclusion of plaintiff's case, on the motion of defendant, instructed a verdict in its favor, upon which verdict a judgment of *nil capiat* and for costs was entered, and plaintiff appeals.

The policy contains a provision that "in case of bodily injury or injuries received through external violent and accidental means, which shall independently of all other causes result in the death of said member, there shall be payable to Davella Martin, wife of James W. Martin, if living, * * * the sum of \$5,000." It also recites that "any and all such payments or liability to pay shall be in accordance with and subject to each and all of the provisions of the by-laws of said association," including amendments, alterations and new issues of such by-laws. The by-laws in force at the time the policy was issued and at the death of the insured provided that notice in writing

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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must be sent to the secretary of the association within fifteen days after the happening of the accident resulting in death, and that claims for death benefits must be presented to the association within thirty days after death, together with full proof of death and of the particulars of the accident claimed to have caused death.

The facts concerning the death of the insured are, in brief, that in the night of January 16, 1912, plaintiff, the wife of the insured, was awakened by the insured arising from his bed, in which she also was sleeping, and hearing him exclaim, "Oh, my God!" Plaintiff thereupon arose and went to her husband and found him on the floor upon his hands and knees trying to pull himself up. It was then discovered that the insured had in falling struck a chiffonier, resulting in the cutting of his lip and nose, from which he freely bled. A physician was called, but the insured died before his arrival. This physician, one Thomas J. Fox, gave a certificate of death, certifying that death was caused by fatty degeneration of the heart superinduced by chronic alcoholism.

Plaintiff and the insured were twice married to each other, first on December 22, 1897, and second on March 12, 1910. In August, 1909, plaintiff divorced her husband, the insured, on the ground of his being an habitual drunkard. On the trial of the divorce suit plaintiff testified that the insured was an habitual drunkard and procured others so to testify, and in the faith of the verity of her own testimony that the insured was an habitual drunkard the divorce was granted and the matrimonial bond sundered.

In the light of these facts, her attempt in this suit to cast doubt upon the fact of the inebriety of the insured must fail. Dr. Fox, a witness for plaintiff, verified by his oath on this trial the facts set forth in his certificate as to the insured's death. He also testified that he knew that the insured was afflicted with heart

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trouble and that this information was communicated to him by the insured personally. Dr. Fox testified that the insured told him that he had heart trouble and that he carried strychnine for his "pump," as he designated his heart. While Dr. Fox would not state positively that the insured stated to him the quantity of strychnine he was in the habit of taking, still he was certain that the insured did tell him that he used strychnine to stimulate the action of his heart, and continually carried it with him for the purpose of meeting any emergency which might arise from the defectiveness of that organ.

In this condition of the testimony, reasonable minds could not well disagree upon the proposition that the insured did not come to his death by accidental means within the terms of the policy, but that he in fact died from fatty degeneration of the heart, resulting from chronic alcoholism. Hence, the instruction of the court to the jury to render its verdict for defendant was without error.

The insurance policy in suit is an accident and not a life policy, and its provisions and conditions bind the parties. That the death of the insured may have been hastened somewhat by the fall may not be doubted, yet his death was not the result of bodily injuries sustained through violent, external and accidental means, independently of all other causes. Unless death did result from bodily injuries sustained through violent external and accidental means, independently of all other causes, there can be no recovery. The evidence in the record on the part of the plaintiff utterly fails in its probative value to establish that the death of the insured was accidental within the conditions of the policy, but on the contrary such evidence establishes that the death of the insured was attributable to fatty degeneration of the heart, and that such fatty degeneration was caused by chronic alcoholism.

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The by-laws of the defendant company are by the policy made a part of the contract of insurance. One of these by-laws provides, in part, that no death claim will be paid "unless said claim for death benefit be presented to the association within thirty days after the death of the deceased member, together with full proof of the death and of the particulars of the accident claimed to have caused said death." The furnishing of the proofs of death within the time required by the by-laws is one of the conditions essential to be performed by the claimant to entitle such claimant to receive from the defendant company the insurance money. A failure to furnish such proofs within the time limited by the by-laws will, unless waived by the company, preclude a recovery. There seems to be no ambiguity in the by-law referred to, and as said in *Norwaysz v. Thuringia Ins. Co.*, 204 Ill. 334: "Contracts of insurance are to be construed like other contracts. If ambiguous terms are used, the meaning more favorable to the insured will be adopted, not because he is the sufferer in a recent loss or because of a disparity in the financial condition of the two parties, but because the words are those of the insurer, and the ambiguity is chargeable to it. Where, however, there is no ambiguity in the terms, neither party is to be favored. If the stipulation is one that the parties could lawfully make, and, having been made, is not actually or inferentially waived, it is the function of the court to enforce its observance as the parties made it, and not to make a new agreement for the purpose of mollifying the hardship that the rigorous and inflexible terms occasion."

The rule as thus laid down is equally the rule of construction to be enforced in this case in holding the parties to their contract obligation, of which time provided for the furnishing of proof of death and claim is a material and essential part. In *Love v. Modern Woodmen of America*, 259 Ill. 102, it was held that a

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by-law containing a provision similar to the one found in this record was binding upon the member.

That proofs were not furnished to the defendant within the time required by the by-law is not disputed. Plaintiff, however, contends that defendant waived the time limit in the by-law and also contends that the mailing of the proofs to defendant within the thirty days was a substantial compliance with the by-law, regardless of the time when such proofs were actually received by defendant. We find no fact in this record warranting this court in holding that defendant by any act waived the by-law regarding the time in which proof of death and claim should be furnished. The fact that defendant delayed sending blanks requested in behalf of plaintiff upon which the proof could be made is of no moment, for the reason that it had not obligated itself to furnish such blanks and the law did not require it so to do.

A failure to furnish such blanks was held in *Great Western Ins. Co. v. Staaden*, 26 Ill. 360, not to operate as a waiver. The doctrine of estoppel does not arise upon the evidence in this record. Fraud is neither charged nor proven as the reason of the delay by defendant in sending the blanks requested. Where fraud is absent, there is no estoppel. *Holcomb v. Boynton*, 151 Ill. 294. Plaintiff urges upon us *Manufacturers & Merchants' Mut. Ins. Co. v. Zeitinger*, 168 Ill. 286, as authority for the contention that the mailing of the proofs within the thirty days was a sufficient compliance with the by-law. We think the *Zeitinger* case, *supra*, clearly distinguishable from the case before us. In the *Zeitinger* case the words interpreted were, "shall render a statement to the company." Here the words are entirely different, rendering their significance and interpretation wholly at variance with the words above quoted. The by-law in the case at bar is that written notice shall be *presented* to the defendant within thirty days after the death of

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the deceased member. Mailing the proof directed to the defendant was not a presentation nor a compliance with the by-law.

In *Miller v. Milwaukee & Mechanics' Ins. Co.*, 181 Ill. App. 133, it was held that a condition in a policy requiring proof of loss within sixty days is not complied with where such proofs are furnished sixty-one days thereafter, and that such failure to furnish such proofs within the time required relieved the defendant from liability.

The Municipal Court did not err in instructing a verdict for defendant, and its judgment is therefore affirmed.

Affirmed.

Ralph E. Hyatt, Defendant in Error, v. A. Volney Foster, Plaintiff in Error.

Gen. No. 21,028. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in this court at the March term, 1915. Reversed and judgment here. Opinion filed December 6, 1915.

Statement of the Case.

Ralph E. Hyatt, plaintiff, against A. Volney Foster, defendant, in the Municipal Court of Chicago, to recover the interest of plaintiff in the profits of a transaction with another. To reverse a judgment of \$635 for plaintiff, defendant prosecutes this writ of error.

The evidence shows that plaintiff was employed by the United States Silica Company, of which defendant was president, and also by defendant in the interest of the estate of Volney W. Foster, deceased, at a salary of \$250 a month, \$150 of which was paid by the Silica

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Company and \$100 by the Foster estate. It was agreed that plaintiff should have twenty per cent. of the profits of the company in excess of \$10,000 per year. It appears, and is not disputed, that plaintiff overdrew his account to June 30, 1912, to the amount of \$3,483.23. During such employment plaintiff had a verbal agreement with defendant that he should receive one-fifth of the profits of a certain deal made with the Thornton Stone Company. It was subsequently agreed between them that plaintiff's share of such profits was \$635. This item of \$635 is the subject-matter of this suit. The evidence shows that defendant wrote plaintiff a letter substantially as follows:

“August 27, 1912.

Ralph E. Hyatt,
Chicago.

Dear Sir: I hand you herewith statement of accounts of U. S. Silica Co. to July 1, 1912, made by Audit Co. of Illinois. You will note the wide discrepancy between your overdrafts as they appear on your books and as analyzed by the Audit Co. as follows:”

Here follow the items of debit and credit which show the state of the accounts and conclude with the item of “Overdrawn as of June 30, 1912, \$3,483.23,” and continues:

“In accordance with my understanding with you, you were to receive in addition to your salary of \$150 per month, you shall receive a bonus of 20% of the net profits of the company in excess of \$10,000 per year.

There is a wide discrepancy between your books and the report of the Audit Co. with reference to your account and you admit the falseness of your account in that respect.

Two courses are now open to me in recovering the company's loss. First: By applying to the Surety Company for compensation under their surety bond which we hold guaranteeing your honesty. Second:

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To retain you in your present position under the following conditions:

1. You to give the company your 5% demand note for \$3,483.32 together with any amounts you may have drawn since June 30, 1912, in excess of your regular salary of \$250 per month * * * and that said demand note shall be reduced by \$100 each month to be taken out of your salary of \$250 per month until all the above note with interest is cancelled.

2. That you assign to the Silica Co. all profits which may be coming to you in accordance with your understanding with me, in connection with Thornton Stone Co., said profit, if any, to apply toward reduction of your note.

3. All bonuses accruing to you shall apply on above note until it is paid with 5% interest.

4. The Audit Company have promised to say nothing to the injury of your reputation, and I also bind myself to the same condition.

Very truly yours,

A. Volney Foster."

Defendant testified, and it was not denied, that he had some conversation with plaintiff about the letter and that plaintiff said to him on the day after its date that the proposition outlined in the letter was acceptable to him.

It was uncontroverted that plaintiff continued in his employment until the following April. He gave to the United States Silica Company his demand note for \$3,525.66, which plaintiff testified was the amount due according to the letter, with amounts overdrawn since June 30th added. There was no evidence that the Audit Company or defendant said anything after the date of the letter to plaintiff's injury.

MATZ, FISHER & BOYDEN, for plaintiff in error.

CANTWELL & SMITH, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

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Abstract of the Decision.

1. **ASSIGNMENTS, § 22***—*what effect of.* Where, in an action to recover part of the profits of a transaction claimed by plaintiff under acceptance of an offer of compromise which involves the assignment of such interest by plaintiff to a corporation of which defendant is an officer, defendant introducing as evidence thereof a letter from him to plaintiff in which it is stated that plaintiff may retain his position in the employ of defendant and the corporation on the condition, among others, that he assign to the corporation all his share in the profits of the transaction, to be applied on a note to be given in settlement of an indebtedness due from plaintiff to the corporation, it is error for the trial court to refuse to hold as a proposition of law that if plaintiff accepted the proposal contained in the letter, he could not recover.

2. **ASSIGNMENTS, § 36***—*when evidence sufficient to show.* In an action to recover plaintiff's interest in the profits of a transaction, where the defense was that prior to the commencement of the action plaintiff had assigned his claim for such profits to another, evidence *held* sufficient to prove such assignment as a fact.

3. **ASSIGNMENTS, § 13***—*when oral assignment valid.* No particular form is necessary to the validity of an assignment of a chose in action, but it may be assigned orally, and it is not essential to the validity of such an assignment that there be written evidence thereof.

4. **ASSIGNMENTS, § 22***—*when title passes.* The unconditional acceptance of an offer of compromise which involves the assignment of a chose in action operates to pass the title thereto to the assignee immediately.

5. **COMPROMISE AND SETTLEMENT, § 4***—*when act of officer is act of corporation.* An offer of compromise made on behalf of a corporation by an individual in his own name to an employee of the corporation is to be construed as the offer of the corporation where the individual making the offer is an officer of the corporation and is acting for it.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. Spencer Turner Co. v. Schwill, 195 Ill. App. 432.

**J. Spencer Turner Company, Defendant in Error, v.
Bruno Schwill, Plaintiff in Error.**

Gen. No. 21,068. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by the J. Spencer Turner Company, plaintiff, against Bruno Schwill, defendant, in the Municipal Court of Chicago. To reverse a judgment for plaintiff for \$10,561.77, defendant prosecutes this writ of error.

ROSENTHAL & HAMILL, for plaintiff in error; CHARLES H. HAMILL, of counsel.

LITZINGER, MCGURN & REID, for defendant in error; EDWARD R. LITZINGER, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 384*—*when objection must be saved below.* Where irregularities occur in the trial court without objection by plaintiff in error, such irregularities cannot be availed of for the first time in the Appellate Court.

2. APPEAL AND ERROR, § 493*—*when judgment in excess of ad damnum not available in absence of objection below.* The objection that the judgment sought to be reversed exceeds the *ad damnum* is not available when made for the first time on review, especially where defendant could not have been misled thereby, as where copies of the notes sued on were part of plaintiff's pleadings, although it may appear from the statement of claim that the judgment is for an amount in excess of what is due.

3. APPEAL AND ERROR, § 1313*—*what presumed where no propositions of law submitted.* Where in a case tried without a jury no propositions of law are submitted to be held by the trial court,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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it will be presumed on review that all questions of law were correctly decided.

4. APPEAL AND ERROR, § 594*—*when motion for new trial ineffective to preserve question for review.* A motion for a new trial in an action tried without a jury preserves no questions of law for review, for the reason that such motion is aimless and serves no purpose available in a higher court.

**E. H. Bayley, Defendant in Error, v. A. E. Coy,
Plaintiff in Error.**

Gen. No. 21,092. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDMUND K. JARECKI, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915. Rehearing denied December 20, 1915.

Statement of the Case.

Action by E. H. Bayley, plaintiff, against A. E. Coy, defendant, in the Municipal Court of Chicago, to recover back money received by defendant with which to purchase stock and misappropriated by him. To reverse a judgment for plaintiff for \$787.50, defendant prosecutes this writ of error.

Defendant, it was claimed, was the agent of plaintiff to purchase 35,750 shares of stock of the Mina Grand Mining Company, for which purpose plaintiff gave him \$1,787.50, upon the representation of defendant that such stock could be bought for that sum and no less. Subsequently plaintiff ascertained that defendant bought 40,000 shares of said stock for \$1,000 and applied to his own use, unbeknown to plaintiff, the remaining \$787.50, together with 4,250 shares of the stock.

It appeared that for a long time defendant had been in the confidence of plaintiff in various deals in stock and that he was in the habit of confiding in defend-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ant's representations in regard to them. The plaintiff lived in Minnesota, while defendant lived in Chicago. Defendant wrote plaintiff under date of March 22, 1906: "I am having the stock transferred as per your instructions and will send the same to you by registered mail this afternoon. *You must promise to never say to any one anything about the price paid nor from whom you did the business with.* You know I am supposed to do what I can to sell treasury stock for 20c per share, but I could not let the opportunity pass to let you in on this deal."

HARRIS F. WILLIAMS, for plaintiff in error; W. SCOTT HODGES and ELDON M. VOTAW, of counsel.

CHARLES DANIELS and SUMNER C. PALMER, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 8*—*when evidence sufficient to show existence of relation.* In an action to recover back money paid to defendant as plaintiff's agent to purchase stock, evidence held sufficient to prove that defendant acted as plaintiff's agent in the transaction.

2. LIMITATION OF ACTIONS, § 20*—*when statute begins to run against action based on fraud.* In an action at law based on defendant's fraud, the statute of limitations will not begin to run until plaintiff discovers the fraud, or might, by the use of reasonable diligence, have discovered it.

3. FRAUDS, § 45*—*when laches not defense.* The rule applicable to an action in equity, that plaintiff's failure to use reasonable diligence to discover the fraud practiced on him is excused so as to prevent his cause of action from being barred by the statute of limitations or laches where defendant sustained a relation of trust and confidence, making it his duty to disclose the truth to plaintiff, is equally applicable to an action at law based on defendant's fraud.

4. FRAUD, § 112*—*when evidence sufficient to show.* Evidence that a defendant who had received money from plaintiff with which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to purchase stock failed to inform plaintiff of the real price paid for the stock, and wrote plaintiff a letter calculated to deter him from making inquiries on his own account, is sufficient to prove fraud on the part of defendant.

**Kathleen M. H. Besley, Defendant in Error, v. Edward
Ridgely, Plaintiff in Error.**

Gen. No. 21,155.

1. LANDLORD AND TENANT, § 88*—*when tenancy from year to year by holding over created.* Where defendant remained in possession after the expiration of his lease for a year it cannot be contended that he so remained pending negotiations for a new lease, it appearing that prior to the expiration of the lease plaintiff sent defendant a new lease and also made repairs at the request of defendant, for the reason that in such case there was no room for negotiation, plaintiff having made known the conditions under which she was willing to continue the tenancy by sending the lease and making the repairs.

2. LANDLORD AND TENANT, § 88*—*when tenancy from year to year implied.* Where a tenant under a lease receives a copy of a new lease for a further term in ample season to enable lessee to accept or reject such lease prior to the expiration of the term of the existing lease, which lessee fails to do but remains in possession after such expiration, paying rent at the same rate as before, the law implies an agreement to continue as tenant for another year at the same rental, in which case it is immaterial that before vacating the tenant sent a thirty-day notice of intention to leave, it appearing that he vacated before the end of the extended term of the lease.

3. LANDLORD AND TENANT, § 88*—*when landlord deemed to have elected to treat contract as from year to year.* In an action to recover for rent due under a lease where it appeared that defendant by his conduct had impliedly agreed to continue as tenant for another year after the expiration of his lease, the election of plaintiff so to treat the contract may be fairly inferred from the fact that plaintiff sent defendant a new lease for another year on the terms of the old lease, and accepted rent at monthly intervals at the old rate.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Besley v. Ridgely, 195 Ill. App. 435.

ERROR to the Municipal Court of Chicago; the Hon. HENRY C. BETTLER, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

FOREMAN, LEVIN & ROBERTSON, for plaintiff in error.

LYMAN, ADAMS & BISHOP, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

We desire to call the attention of counsel to their violation of section 99, ch. 110 (J. & A. ¶ 8636), entitled "Practice," in not entitling their case on review as it is entitled in the trial court, as provided by said section 99. The abstracts and briefs are all erroneously entitled. The statute was passed to preserve uniformity of title in every court and to prevent confusion arising from changes in titles, and should be obeyed accordingly.

This is an action for one month's rent of an apartment in which the parties hereto are respectively landlord and tenant. The landlord prevailed in the trial court and the tenant seeks this review. The controlling facts are as follows:

First. Ridgely, the defendant, occupied under a written lease an apartment of plaintiff at 201 East Chestnut street, Chicago, from November 1, 1909, to September 30, 1912, at a monthly rental of \$135.

Second. Following a conversation between defendant and an agent of plaintiff, a written lease for another year was sent by the agents of plaintiff to defendant for execution by him prior to the expiration of the existing lease.

Third. There was some discussion about certain repairs to be made by the landlord to the satisfaction of defendant's wife, and a reduction in the rent was sought.

Fourth. Certain repairs were made and defendant continued to occupy the apartment until July 31, 1913,

when he removed all his effects from the premises with the exception of two trunks, which remained in the apartment until the next day, as defendant admits, but as plaintiff claims until the day thereafter, being August 2nd.

Fifth. On June 30, 1913, defendant gave notice to plaintiff that he would surrender possession of the apartment on July 31, 1913, and terminate the tenancy at that time.

Sixth. That the lease sent defendant was retained by him, but he did not execute it.

Seventh. That defendant paid rent from the termination of his first lease, September 30, 1912, to July 31, 1913, at the same rate as theretofore, and that this action is for August 1913 rent.

Defendant's counsel have, both in printed and oral argument, striven with much industry and ingenuity to distinguish their case from the general well-settled principles of law applicable to the facts as above outlined. However, from the conclusions at which we have arrived, it is evident that their efforts in this regard have been unsuccessful.

Defendant's counsel state in their brief that plaintiff contends that she was entitled to recover \$135 as rent for the month of August on the theory, first, that defendant remained in possession of the premises after the expiration of the old lease and therefore became a tenant for another year; and, second, that if the facts did not constitute a hold-over tenancy from year to year, the plaintiff in error was a tenant from month to month and was liable for the August rent by reason of the fact that the two trunks remained in the apartment after the first of August.

It is a denial of the facts to contend that defendant remained in possession pending negotiations for a new lease. There was nothing to negotiate after plaintiff had made known the conditions under which she would be willing to continue the tenancy, which she made

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evident by sending defendant a new lease and by making the repairs. The lease was sent in ample time for defendant to accept or reject it before the term of the existing lease expired, and he did neither. By remaining in possession after the expiration of the old lease and paying rent thereafter according to the terms of the old lease, the law fixes his status and holds him as tenant for another year at the same rental. Furthermore, as to the amount of the rent, defendant ratified what the law exacted by continuing to pay at the same rate. The giving of the thirty-day notice did not change the status of the contract of the parties, which the law implied from defendant's holding over and continuing to pay rent at the rate fixed by the old lease.

Of all the cases—and they are numerous—announcing the doctrine that, where a tenant occupies premises under a lease for a year or years and holds over after the expiration of such lease, without having made any new agreement with the landlord under which such holding over takes place, the tenant may, at the election of the landlord, be treated as tenant for another year upon the terms of the original lease *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151, is most analogous on fact and principle to the one at bar, possessing, as it does, many of the same controversial elements. The election of plaintiff to hold defendant for another year may be fairly inferred both from the sending to defendant of a lease for one year upon the terms of the old lease, and the acceptance of monthly rental from defendant at the old rate. This case does not come within the ruling of *Schilling v. Klein*, 41 Ill. App. 209, and kindred cases.

The judgment of the Municipal Court is right, and it is therefore affirmed.

Affirmed.

Hydraulic Engineering Works v. Williams, 195 Ill. App. 439.

**Hydraulic Engineering Works, Defendant in Error, v.
George B. Williams, Plaintiff in Error.**

Gen. No. 21,173. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. ROBERT H. SCOTT, Judge, presiding. Heard in this court at the March term, 1915. Reversed and judgment here. Opinion filed December 6, 1915.

Statement of the Case.

Action by the Hydraulic Engineering Works, a corporation, plaintiff, against George B. Williams, defendant, in the Municipal Court of Chicago, to recover for repairing an automobile belonging to defendant.

To reverse a judgment for plaintiff for \$160.93, defendant prosecutes this writ of error.

Defendant delivered his automobile to one Richter for repair. Richter had theretofore repaired the same automobile for defendant. The evidence showed that Richter did some work on the automobile and then took it to the shop of plaintiff and asked him to finish the job, which it did. Defendant had an agreement with Richter to do the repair work on the automobile for \$200. Defendant offered to prove that he had paid Richter the contract price for making the repairs.

HARVEY T. FLETCHER and BUNGE & HARBOUR, for plaintiff in error.

McARDLE & McARDLE, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 377*—*when evidence of payment to another inadmissible.* In an action to recover for repairing an automobile, where the only question involved is the fact of a contractual relation between plaintiff and defendant, evidence is incompetent that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant had paid the contract price for such repairs to a person with whom defendant had a contract therefor, and that such third person had turned the work over to plaintiff after partially completing it.

2. **CONTRACTS, § 385***—*when evidence insufficient to show contractual relation.* In an action to recover for repairing an automobile, where the only question at issue was the privity of contract between plaintiff and defendant, judgment for plaintiff *held* not sustained by the evidence.

Ralph C. Kent, Appellant, v. Edward J. Thelin, Appellee.

Gen. No. 21,190.

1. **BILLS AND NOTES, § 372***—*what does not constitute variance.* Where a special count in a declaration declared on a promissory note, alleging plaintiff to be a holder for value before maturity and where the evidence showed that plaintiff took the note after maturity from an indorser who held it before maturity, *held* no variance, for the reason that a remote indorsee of a promissory note may declare on the note as the immediate indorsee of the first or any intermediate indorser, in which case plaintiff's title relates back to the title of such indorser.

2. **PLEADING, § 451***—*necessity that defense of variance be raised in trial court.* The defense of variance is not available for the first time on review, for the reason that if such defense is not made in the trial court it is cured by verdict.

3. **PLEADING, § 451***—*necessity that objection on grounds of variance be specific.* A general objection of variance is not sufficient, and in order to make the defense available the objection must be sufficiently specific so that, if well taken, the pleading may be amended so as to conform to the proof, for the reason that such objection is one of procedure and does not go to the merits.

4. **BILLS AND NOTES, § 370***—*admissibility of note under common counts.* A promissory note is competent evidence under a declaration declaring upon it under the common counts.

4. **BILLS AND NOTES, § 420***—*when evidence of transactions between maker and payee inadmissible.* Evidence of transactions between the maker and payee of a promissory note which relates

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to the inception of the note is incompetent as evidence in defense where the action is brought by an innocent holder for maturity.

5. **BILLS AND NOTES, § 389***—*when failure of consideration not be shown under general issue.* In an action to promissory note where one count declared on the note and common counts and where defendant interposed a plea of general issue generally to the whole declaration, the admission tending to prove want of consideration held error in reason that such pleas did not raise the defense relied

Appeal from the Circuit Court of Cook county; the Hon. JUDGE McNUTT, Judge, presiding. Heard in this court at the December term, 1915. Reversed and remanded. Opinion filed December 15, 1915.

HOYNE, O'CONNOR & IRWIN, for appellants.
APPELL, of counsel.

ROBERT F. PETTIBONE, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

This cause was tried before the court without a jury and resulted in a verdict and judgment for the defendant and plaintiff appeals.

The action is on a promissory note for \$1,000, made by defendant, payable four months after its date in the order of Charles Lyle Barnes. Barnes transferred it to Agnes Gahan Barnes, who indorsed it to the Wood Trust & Savings Bank, before its maturity the bank indorsed it to plaintiff. The bank was a purchaser in good faith before maturity, and through plaintiff, the bank publicly protested the note for nonpayment. The declaration consisted of three counts, specially on the note, and the common counts, to which the defendant pleaded the general issue, supported by affidavits of merits reciting want of consideration as the defense.

It is now urged in support of the judgment that there is a variance between the allegations of the first two counts and the proof, the averment being that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Q. topic and section number.

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was the holder of the note for value before maturity, and the proof showing that plaintiff is a holder of the note after maturity.

We cannot agree with defendant's contention that there is such variance. The title of plaintiff related back to that of the bank, and it is not disputed but that the bank was a holder for value before maturity. It is also the law that a remote indorsee may declare on the note in his pleading, as the immediate indorsee of the first or any intermediate indorser. Measured by this rule, the averment that plaintiff was holder before maturity was not inaccurate in point of law. *Puterbaugh's Pleading and Practice*, 104, and cases cited in footnote.

Moreover, the objection of variance cannot be availed of in a court of review if there made for the first time. It must be made specifically in the trial court, otherwise it is cured by verdict. A general objection of variance would not fulfil the legal requirement. It must be so specific that, if well taken, the pleading may be amended to conform to the proof, as such objection is one of procedure and does not affect the merits. *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248.

In *Lake Shore & M. S. Ry. Co. v. Ward*, 135 Ill. 511, the court illustrated the rule as to variance by the following language: "It was incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to so amend her pleading as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim." Again, the note was admissible in evidence under the common counts, and the plea of general issue to the whole declaration did not raise the defense injected by the evidence given on the part of the defendant against the objection of plaintiff. It was error to overrule the objections inter-

posed. Evidence as to defendant's Barnes, arising out of transactions in v was given, was not admissible as a defense in the hands of an innocent holder for maturity.

The judgment of the Circuit Court is as the cause was tried with a jury it is new trial.

Reversed and

**Franco-American Hygienic Company,
Error, v. Edward J. Chladiek, Defendant**

Gen. No. 21,213. (Not to be reported)

Error to the Municipal Court of Chicago; the Hon. Judge, presiding. Heard in this court at the ...
Reversed and judgment here. Opinion filed December

Statement of the Case.

Action by the Franco-American Hygienic Company, a corporation, plaintiff, against Edward J. Chladiek, defendant, in the Municipal Court of Chicago to recover on a guaranty by defendant for another. To reverse a judgment for defendant plaintiff prosecutes this writ of error.

On October 9, 1911, defendant signed to plaintiff the following guaranty contract:

"In consideration of year entrusting

 Name Jessie B. Gordon

 Address Lincoln, Ill.

from time to time while in your employment to handle and sample cases as you may deem it proper to use in her capacity as Traveler for the company.

I HEREBY GUARANTEE that she will return and goods furnished her within thirty days of any written demand has been mailed to her.

Franco-American Hygienic Co. v. Chladlek, 195 Ill. App. 443.

Should she fail to return such goods and samples furnished her within thirty days after demand having been made, or having done so, if there still remains a balance on her account unpaid, I agree to pay for same, not to exceed the sum of Fifty Dollars.

FOR THE PURPOSE of securing this credit for her, I state that I am worth One Thousand Dollars over and above all debts, liabilities and exemptions.

IT IS UNDERSTOOD that a series of transactions is contemplated and this guaranty is for the purpose of covering any balance that is or may become due after demand for settlement has been made.

THIS SURETY shall remain in full force and effect until withdrawal of same shall be received and duly acknowledged in writing by the Franco-American Hygienic Company.

(Signed) Edward J. Chladek."

After receipt of the foregoing guaranty, plaintiff employed Jessie B. Gordon, therein named, as traveling saleswoman and intrusted to her certain of its goods. On the severing of the relations between plaintiff and Miss Gordon there appears from a statement rendered to her by plaintiff to be due plaintiff the sum of \$71.14, which sum neither Miss Gordon nor defendant paid. The following facts were agreed upon at the trial:

That defendant signed the guaranty pleaded and turned it over to Miss Jessie B. Gordon, therein named, and that said Gordon owes plaintiff \$71.14. The defense was that the guaranty was given October 9, 1911; that defendant heard nothing about it until 1913; that he received no consideration; that defendant received notice neither of the acceptance of guaranty nor of default by Gordon; that no demand was made on defendant to comply with the guaranty, and that time in which to pay was extended to Gordon.

HOMER K. GALPIN, for plaintiff in error.

No appearance for defendant in error.

The Standard Brewery v. Lynch, 195 Ill. App. 445.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 86***—*what constitutes sufficient consideration to support contract.* In an action to recover on a contract whereby defendant guarantied the return of goods supplied to a third person for use by such person as samples while employed by plaintiff, the employment of such third person by plaintiff is a sufficient consideration to support the contract sued upon.

2. **LIMITATION OF ACTION, § 21***—*when action on contract of guaranty barred.* An action to recover on a contract of guaranty containing no limit of time may be maintained at any time before such action is barred by the statute of limitations affecting such contracts.

3. **GUARANTY, § 6***—*when notice of acceptance of guaranty unnecessary.* In an action to recover on a contract of guaranty, unlimited as to time, but limited as to amount, proof of notice to guarantor of the acceptance of the undertaking is not necessary.

4. **GUARANTY, § 33***—*what facts must be specially pleaded.* In an action to recover upon a collateral, continuing guaranty if defendant in defense relies on the fact that no suit was brought against the principal to recover the debt, and that no notice of the default in payment was given to defendant, such facts must be specially pleaded, for the reason that in such case proof of the indebtedness and of the guaranty entitles plaintiff prima facie to recover.

5. **GUARANTY, § 27***—*when failure to give notice of default of principal available as defense.* In an action to recover on a guaranty, the fact of failure of plaintiff to notify defendant of the default of principal can be availed of as a defense only in so far as defendant can show damage as a result of such want of notice.

The Standard Brewery, Defendant in Error, v. John Lynch, Plaintiff in Error.

Gen. No. 21,225. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HUGH J. KEARNS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Standard Brewery v. Lynch, 195 Ill. App. 445.

Statement of the Case.

Action by the Standard Brewery, a corporation, plaintiff, against John Lynch, defendant, in the Municipal Court of Chicago, to recover on a contract to purchase beer and to rent saloon fixtures. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

The defendant entered into a contract with plaintiff, dated the 27th of March, 1908, agreeing to purchase and receive from the brewery, and from no other person, firm or corporation, all the domestic draft and bottled beer which might be kept for sale or sold by him, his agent or his servant, at, in or about his saloon at 2012 Dearborn street, Chicago, from the 1st of May, 1908, to the 30th of April, 1911, except some Budweiser beer, and the brewery agreed to furnish during that time all the beer necessary to supply defendant's needs. Plaintiff also agreed to supply defendant with certain saloon furniture and fixtures.

The contract provided that in case of breach by defendant, he should pay to plaintiff the sum of two hundred dollars "as and for its liquidated damages for and on account of loss of profits on the sale of beer by reason of such breach of contract," and in addition pay the sum of two hundred dollars for the reasonable rental for the use of furniture and fixtures furnished under the contract and as reimbursement for expenses incurred in equipping the premises for the conduct of defendant's business.

The contract further provided that if defendant, his heirs, etc., have domestic beer of other manufacturers than plaintiff upon his saloon premises, such fact shall be deemed and taken to be a breach of this contract and shall entitle the plaintiff to the damages specified.

Defendant in his affidavit of defense denied that he executed the contract, or that he ever had any dealings with plaintiff, and further denied that there was at

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any time any domestic beer of the manufacture of any person, firm or corporation other than plaintiff sold at the saloon or kept on the saloon premises, except Budweiser beer; averred that a Mrs. Jahn owned and ran the saloon, and that he was only her barkeeper and never had any financial interest in the saloon except to draw his wages.

OSCAR E. LEINEN, for plaintiff in error.

BAKER & HOLDER, for defendant in error; G. RAYMOND COLLINS, of counsel.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1411*—*when verdict of jury will not be disturbed.* Where the evidence is conflicting the verdict of a jury will not be disturbed although the jury may have believed some witnesses and discredited others, especially where the witnesses discredited were contradicted by admitted facts, for the reason that in such case it is the province of the jury to find the facts, and having the witnesses before them and observing them on the stand, together with their candor or want of it, they may better decide to which witnesses credit should be given.

2. WITNESSES, § 275*—*when jury may discredit testimony of witness.* Where the testimony of a witness is contradicted by admitted facts, it is proper for the jury to regard such admitted evidential facts as controlling, and to discredit the testimony of the witness in so far as in conflict with such facts, as where in an action to recover on a contract whereby defendant agreed to purchase beer of plaintiff for use in a named saloon, defendant first denied ownership of the saloon and later admitted that both the license and "beer book" thereof were in his name.

3. DAMAGES, § 88*—*when contract provides for liquidated damages and not for penalty.* In an action to recover on a contract whereby defendant, a saloon-keeper, agreed to sell no domestic beer except that manufactured by defendant, which contract provided that in case of breach by defendant a sum of money recited therein to be liquidated damages should be paid to plaintiff, *held* that the damages provided were liquidated damages and not a penalty, there

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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being no evidence of fraud or circumvention, and the amount not appearing to be unconscionable or disproportionate to the damages likely to result from the breach.

4. DAMAGES, § 66*—*measure of damages for breach of contract to buy beer and rent saloon fixtures.* In an action on a contract which provided for liquidated damages in case of breach by defendant and also for a payment of rental for the use of saloon fixtures supplied to defendant by plaintiff, and as reimbursement for expenses incurred in installing such fixtures, a judgment for plaintiff held not erroneous in that it represented the combined amount of such sums.

**Scovill Manufacturing Company, Appellee, v. Ray
Fulton Cassidy and Jacob Alter, Appellants.**

Gen. No. 21,251.

1. PLEADING, § 232*—*when allowance of amendment discretionary.* A motion for leave to file an amended affidavit of merits is addressed to the sound discretion of the trial court, and the exercise of such discretion in denying the motion will not be reviewed by the Appellate Court, especially where no fact is alleged in the proposed amendment injecting any merit into the defense which would not be competent under the affidavit on file.

2. APPEAL AND ERROR, § 1033*—*when rules of trial court brought up on certificate of clerk under order of trial court.* On a writ of error to review a judgment of the Municipal Court of Chicago, where the rules of such court are material to the issues and are not contained in the bill of exceptions, such rules are sufficiently made part of the record in the Appellate Court, so far as pertinent, when certified by the clerk under an order of a judge of the Municipal Court, such order being filed in the Appellate Court by leave of that court, although the better practice in such case is to include such rules in the bill of exceptions.

3. PLEADING, § 359*—*when omission of motion to strike harmless.* Where the affidavits of meritorious defense in an action in the Municipal Court of Chicago do not state a defense to the action, and plaintiff does not make a motion to strike, such affidavits acquire no additional force from plaintiff's failure to object to them, and he waives no right by not objecting.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. GUARANTY, § 19*—*when change of name of creditor corporation not a release.* In an action to recover on a contract whereby defendants guaranteed the account of a corporation, which during the continuance of the guaranty changed its name, and where part of the account sued for was contracted by the corporation under the changed name, the change of name neither added to nor detracted from the risk of the guaranty, for the reason that the guaranty contemplated the legal corporate entity, and the name was mere *descriptio personae*.

5. GUARANTY, § 19*—*when stipulation permitting change of name of creditor corporation deemed incorporated in guaranty.* A contract of guaranty whereby the account of a corporation is guaranteed must be construed as though parties had incorporated therein a stipulation that such corporation might change its name without detracting from the force or validity of the guaranty, where it appears that such corporation by statute had power to change its name.

6. GUARANTY, § 28*—*when guarantor estopped.* Where guarantors of the debt of a corporation are also officers and stockholders thereof, and cause such corporation to change its name for the purpose of evading liability on their contract of guaranty, such guarantors are estopped to set up such change of name as a defense in an action against them to recover on the guaranty.

7. GUARANTY, § 28*—*when guarantor charged with knowledge.* Guarantors of the debt of a corporation who are also officers engaged in transacting the business of the corporation are charged with knowledge of the furnishing of the goods on which the debt guaranteed is based.

8. GUARANTY, § 6*—*when guarantor not entitled to notice of commencement of liability.* Guarantors are not entitled as matter of law to notice either that their guaranty is accepted or that credit has been given to the principal on the faith of the guaranty.

9. GUARANTY, § 14*—*when continuing.* In an action to recover on a contract of guaranty whereby defendants guaranteed the account of a corporation to the extent of a named sum, contract construed and *held* to be a continuing guaranty, without limitation except that of the extent of liability, and not terminated by the creditors contracting an indebtedness in excess of the amount guaranteed.

10. PLEADING, § 38*—*when strictly construed.* Where there are two defendants in an action and one alleges matter in defense in which the other does not join, such pleading filed by one defendant alone must be strictly construed, and no intendment indulged not fairly inferable from the words of the pleading.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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11. PLEADING, § 152*—*when affidavit of defense insufficient.* An averment in an affidavit of defense to an action to recover on a contract of guaranty, that subsequently to the execution of the contract the guaranty sued upon was terminated by notice without stating the time when such notice was given, is too vague and indefinite to be an element of defense, there being a possibility that such averment applies to a date subsequent to those when the goods which were the basis of the debt guaranteed were furnished to the principal.

12. GUARANTY, § 12*—*what extent of liability under.* In an action upon a continuing guaranty, where the extent of defendants' liability is fixed by the contract at a named amount, plaintiff is entitled to judgment for the full amount for which defendants are liable, upon proof that the amount of the debt guaranteed is in excess of such limit.

13. GUARANTY, § 36*—*what effect of admission by guarantor.* In an action to recover on a contract whereby defendants guaranteed the debt of a corporation, the admission of one of the defendants who was manager of the corporation whose debt was guaranteed is competent as to the amount due, and if not rebutted will be conclusive.

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915. Rehearing denied December 20, 1915.

BLUM, WOLFSOHN & BLUM, for appellants.

FRANCIS X. BUSCH, ALFRED W. CRAVEN and ELMER M. LIESSMANN, for appellee.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The parties to this appeal have thrice had their cause before court and jury. On the first occasion a juror was withdrawn; on the second and third occasions verdicts in favor of plaintiff and against defendants for \$5,000 each were rendered. A new trial was granted from the first verdict, and judgment entered on the second, and defendants appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is a first-class case in the Municipal Court and is to be adjudged within the terms of the statute and the rules of court governing procedure in cases of that class.

This action is founded on a contract in the nature of a guaranty, in which the defendants are the guarantors. It is in the following terms:

“Whereas, Canchester Incandescent Light & Heat Co., located in Chicago, Ill., desire to have certain articles manufactured by the Scovill Manufacturing Company, a corporation duly organized and located in Waterbury, Conn., and for that purpose has given the Scovill Manufacturing Company a certain order for the manufacture of said articles, and expect in future to give other orders for the manufacture of other articles,

Now, Therefore, the undersigned, in consideration that the Scovill Manufacturing Company will accept all such orders and will manufacture and deliver all such goods to the said Canchester Incandescent Light & Heat Co., as the same shall be required from time to time, do hereby become surety for the punctual payment to the said Scovill Manufacturing Company of all money which shall become due to the said Company by reason of the manufacture and delivery of goods which have been or shall hereafter be ordered by the said Canchester Incandescent Light & Heat Co., and if any default shall be made in such payment, or parts of payment, we do covenant and agree with the said Scovill Manufacturing Company to pay the said Company on demand of such sum or sums of money as shall be sufficient to make up such deficiency and fully satisfy the terms and conditions of any order or orders which have been or shall hereafter be given to the said Company by the said Canchester Incandescent Light & Heat Co., without requiring any notice of non-payment or proof of demand being made, provided that the sum required to make up said deficiency shall not exceed five thousand dollars (\$5,000).” It is signed by the defendants as of December 24, 1906.

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Plaintiff in its affidavit, filed with its statement of claim, claims \$5,000 for money due and owing under the conditions of the guaranty contract above referred to. Defendants each filed separate affidavits of meritorious defense. Each affidavit contains the following four separate items of defense:

“1. The Canchester Incandescent Light & Heat Co. is not indebted to the plaintiff in any sum whatsoever. If there is any indebtedness the same is due from the Canchester Light Co.

2. It is provided in the contract of guaranty, sued on herein, that this defendant shall not be liable thereon, if the indebtedness to the plaintiff exceeds the sum of five thousand dollars (\$5,000).

3. The plaintiff did not within a reasonable time notify this defendant that his guaranty was accepted and that credit had been given on the faith of it.

4. The contract of guaranty sued on herein was given only for the merchandise ordered by the Incandescent Light & Heat Co. from the plaintiff, at the time of the execution of said guaranty and the plaintiff has been put upon notice that this defendant would not be liable upon said guaranty for any merchandise ordered thereafter.”

The defendant, Ray Fulton Cassidy, added as a fifth defense the following:

“5. That subsequent to the execution of the said supposed contract of guaranty the said plaintiff was notified that said contract of guaranty was terminated and that the defendants would not be further liable upon such contract of guaranty.”

We will first dispose of the two questions of practice which defendants have raised:

First. After the rendering of the first verdict and the granting of a new trial, and before the entering upon the trial resulting in the judgment appealed from, defendants asked leave to file an amended affidavit of merits, which the court denied. This motion was addressed to the sound judicial discretion of the court. *Misch v. McAlpine*, 78 Ill. 507; *Himrod Coal Co. v.*

Clark, 197 Ill. 515. We are unable to say that in denying such leave the trial judge abused such discretion, and we therefore hold that the ruling of the court in that regard is without error. Moreover, from an examination of the proposed amended affidavit found in defendants' supplemental record, we are unable to discover any fact which would inject any merit into the defense which would not be admissible under the affidavits of merits then on file.

Second. After the perfecting of this appeal, plaintiff procured from a judge of the Municipal Court an order directing the clerk to certify the rules of the Municipal Court to this court, which order, by leave of this court, has been filed here, and defendants object. The rules of the Municipal Court certified by the trial judge, although not included in the bill of exceptions, we think are properly before us, so far as the rules so certified are pertinent to the decision of this case. This manner of bringing the rules of the trial court to the attention of a court of review, we think, falls within the suggestion appearing in *Dahms v. Moore*, 110 Ill. App. 223. While it is the better practice to have such rules included in the bill of exceptions, we are of the opinion that the method adopted is sufficient to make them a part of the record of the case.

Under rules 17 and 19 of the Municipal Court, the affidavits of the parties became the pleadings in the case. The proofs of both parties are circumscribed within the matters of claim and defense set forth in their respective affidavits. Measured by these rules, these affidavits did not set forth a meritorious defense to the claim of plaintiff as made by its affidavit. While plaintiff might have made a motion to strike the affidavits of defense from the case, yet it was not bound so to do, and it waived no right in not so doing. Neither did defendants' affidavits acquire any additional force as a defense because of the failure of

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plaintiff to object to them. As they set forth no defense, they were harmless and in no way inimical to the claim of plaintiff.

Rule 19 provides that "every allegation of fact in any statement of claim * * * if not denied specifically or by necessary implication in the affidavit of defense filed in reply by the opposite party, shall be taken to be admitted * * * ." *Weil v. Federal Life Ins. Co.*, 182 Ill. App. 322, and *Hamill v. Watts*, 180 Ill. 279, sustain the rule of the Municipal Court in this regard.

We will now pass upon the defenses set forth in the affidavits of defense *seriatim*.

The first item of defense does not deny the amount of the indebtedness, but avers that whatever is due is not due from the Canchester Incandescent Light & Heat Company, but from the Canchester Light Company. This raises the defense, which is one of law, whether the change of the corporate name terminated defendants' liability under the contract. The record shows that the name of the Canchester Incandescent Light & Heat Company, whose account to the amount of \$5,000 was guaranteed by the contract, was changed to the Canchester Light Company, as permitted by the statutes of this State, from which it held its charter.

Dupee v. Blake, 148 Ill. 453, is not pertinent to the facts of this case. In the *Dupee* case, *supra*, the guaranty was as to a firm composed of certain individuals. Another individual was afterwards taken into the firm, and it was held that the contract of guaranty was to be strictly construed and that the taking in of an additional partner or the retiring of one from the firm would extinguish the obligation after the change, unless from the terms of the instrument it appeared that the parties intended the guaranty to be a continuing one without reference to the composition of the firm.

In the case at bar a corporation and not a firm was guaranteed, and the change of the name of the corporation neither added to nor detracted from the risk under the guaranty, for, as held in *Rouss v. King*, 74 S. C. 251, the guaranty contemplated the legal entity regardless of the name, and the name was merely *descriptio personae*.

Defendants' contract must be construed in the light of the law as it existed at the time of its execution. A corporation had, at the time the contract in controversy was executed, a right under the statute to change its name as well as the objects for which it was incorporated. The parties must be held to have entered into the contract with knowledge of the law, and the contract must therefore be read and construed as if defendants had stipulated in it that the corporation might change its name without detracting from its force or validity. As a matter of fact, the defendant Cassidy signed the certificate of change of name as secretary of the company, and consequently was not only cognizant of the change, but a party to it. Thereafter she continued to be a stockholder, a director, and secretary and treasurer of the corporation; and the defendant Alter continued to be a stockholder, a director, and vice-president, and Canchester continued as manager thereof. If it could be contended that these defendants resorted to the subterfuge of changing the name of the corporation as a means of escaping liability upon their contract of guaranty, we should hold that they were estopped by their acts from avoiding their liability in such a way. *Springfield Lighting Co. v. Hobart*, 98 Mo. App. 227.

As officers of the Canchester Company, defendants are chargeable with knowledge that the goods furnished by plaintiff in faith of their guaranty were received by the company. Furthermore, the company continued to receive such goods from plaintiff without any intimation from defendants, until after this claim

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accrued, that they disavowed their liability as guarantors under the contract in suit.

We think *Chicago Title & Trust Co. v. Zinser*, 264 Ill. 32, is authority for the proposition that one entering into an agreement with a corporation does so with knowledge of the statute which allows corporations to, among other things, change their name or the object for which the corporation was originally formed. As decided in *Springfield Lighting Co. v. Hobart*, *supra*, one guarantying the account of a corporation does so with knowledge of the law that the corporation may change its name or purposes, and this provision of the law thereby becomes a part of the contract of guaranty, as much so as if the guarantors had stipulated that the changes or alterations might be made.

The second item is false in fact. The contract did not provide that defendants should not be liable thereon if the indebtedness of the plaintiff exceeded the sum of \$5,000, as therein stated, but on the contrary the contract limited the liability of defendants to the sum of \$5,000.

The third item of defense is vicious in point of law because, as matter of law, it was not necessary for plaintiff to notify defendants that it had accepted the guaranty or that in faith of it plaintiff had extended credit.

The fourth item of defense, that the guaranty was only for merchandise ordered by the Incandescent Light & Heat Company from plaintiff at the time of the execution of the guaranty, finds no support in the terms of the guaranty itself. The preamble of this document recited that the Canchester Incandescent Light & Heat Company desire to have certain articles manufactured by plaintiff and for that purpose has given the Scoville Manufacturing Company a certain order for the manufacture of said articles, and expects in the future to give other orders for the manufacture of other articles. The condition and consideration for

the guaranty as recited in the contract is that plaintiff "will accept all such orders and will manufacture and deliver all such goods to the said Canchester Incandescent Light & Heat Company as the same shall be required from time to time, do hereby become surety for the punctual payment to the Scoville Manufacturing Company of all money which shall become due to the said Company by reason of the manufacture and delivery of goods which have been or shall hereafter be ordered by the said Canchester Incandescent Light & Heat Company." This is a continuing guaranty, without limit as to time of credit to be extended, the only limitation being that of the liability of the defendants.

The fifth item of defense interposed by the defendant Cassidy is, to say the least, so indefinite as to the time when and by whom plaintiff was notified that the contract of guaranty was terminated, as to be without force as a defense. As the affidavit is the pleading of defendant Cassidy, it must be strictly construed, and no intendment indulged which is not fairly inferable from the words used. The averment that subsequent to the execution of the contract notice was given without specifying any date could as well apply to a date subsequent to the extension of the credit as before that time. Such averment is altogether too vague and indefinite to constitute even an element of defense.

Plaintiff proved the extension of credit to the corporation within the terms of the guaranty contract in suit, and that the amount due and unpaid thereon was largely in excess of the sum of \$5,000. It was therefore entitled to a judgment for the maximum amount denominated in the contract. The admission of Canchester as to the amount due from the corporation, he being its manager, was competent and, without countervailing proof, is conclusive.

Finding no reversible error in this record, the judgment of the Municipal Court is affirmed.

Affirmed.

Smith et al. v. Kastor, 195 Ill. App. 458.

**Frank Morse Smith and W. H. Gelshenen, trading as
N. J. Baker & Brother, Appellants, v. Ernest H.
Kastor et al., Appellees.**

Gen. No. 21,259.

1. PLEADING, § 200*—*when demurrer admits provisions of foreign law.* In a bill to enforce a cause of action predicated by the averments of the bill on the statutory and constitutional provisions of a foreign State, such provisions are before the court as facts, and a demurrer to the bill admits the verity of the provisions.

2. CORPORATIONS, § 226*—*when enforcement of liability in creditors.* Under a statute providing that "any creditor of the corporation may institute joint or several actions against any of its stockholders that have not wholly paid the capital stock held by him," such liability to be "determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced," *held* that the right of action if any, under such statute to enforce a claimed liability, grounded on the alleged fact that defendants unlawfully acquired from the corporation certain shares of its stock, is in the creditors and not in the trustee in bankruptcy of the corporation, the statute not giving such right of action to the corporation.

3. CORPORATIONS, § 192*—*when stockholder's liability founded on statute.* An action to enforce a stockholder's liability on his subscription is based upon statute, stock subscriptions having been unknown to the common law.

4. CORPORATIONS, § 522*—*when creditor's right of action does not pass to trustee of bankrupt corporation.* A right of action conferred by statute upon the creditors of a corporation and not on the corporation does not pass to the trustee in bankruptcy of the corporation.

5. CORPORATIONS, § 226*—*when rights of creditors of bankrupt foreign corporation do not pass to trustee.* Where the statutes of the State under which a bankrupt foreign corporation is organized give to creditors the right of action to enforce payment for stock, the fact that the corporation was authorized to do business in this State does not operate to give such right of action to the trustee in bankruptcy.

6. CORPORATIONS, § 724*—*when liability of stockholder in foreign corporation not enforceable.* No action is maintainable in the courts of this State by creditors against resident stockholders of a bankrupt foreign corporation to enforce payment for stock, where the right of action sought to be maintained is predicated on the statutes

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of the foreign State until the courts of such foreign State, in an appropriate proceeding, shall have determined the relation of creditors, stockholders and corporation to each other as well as the proportionate share of the indebtedness to be borne by each solvent stockholder.

7. PARTIES, § 31*—*when substitution unauthorized.* In a bill brought in this State to enforce payment for stock in a bankrupt foreign corporation, the allowance of a petition to substitute the trustee in bankruptcy as complainant and to eliminate the original complainants as such, *held* erroneous where the statutes of such foreign State confer such right of action on creditors and not on the corporation.

8. STATUTES, § 7*—*when remedy under foreign statute not enforceable.* No special remedy provided by the legislation of a foreign State is enforceable in the courts of this State under the principle of comity.

9. CORPORATIONS, § 229*—*what parties essential to suit by creditors of foreign corporation.* Where, in a bill by creditors of a bankrupt foreign corporation to enforce payment for stock, it is nowhere alleged that the cause of action sought to be enforced is contractual, but where on the contrary such cause of action is admittedly statutory, the corporation and stockholders are necessary parties to the action, a determination of their liabilities and relations to each other being essential.

10. EQUITY, § 213*—*when demurrer to bill properly sustained.* Where a bill stated no fact giving the court jurisdiction to decree relief, a demurrer thereto *held* properly sustained.

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

ROBERT J. FRANK, for appellants.

HARRIS F. WILLIAMS and CHARLES SCRIBNER EATON, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

The cause as above entitled also involves an appeal in No. 21,258 by Edwin D. Buell, trustee in bankruptcy of U. S. Kellastone Company (*post*, p. 464), a bankrupt, substituted, on his own motion and against the protest of complainants, as sole complainant in the

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cause. Both appeals will rest for their decision upon this opinion.

Complainants filed their bill as creditors of the U. S. Kellastone Company, a bankrupt, in their own behalf and in behalf of such other creditors of the bankrupt as might wish to join as parties complainant against the defendants, whereby they sought to enforce a liability alleged against defendants as owners of 3,000 shares of the stock of the U. S. Kellastone Company. It is averred that defendants obtained the stock, not as original subscribers thereto, but from the Kellastone Company, in whose treasury it was at the time, without paying any adequate or lawful consideration therefor. The method or manner of the dealings by which defendants became possessed of the stock not being material to our decision is omitted from this recitation.

Defendants interposed general demurrers to the bill. Before disposing of the demurrers, Buell, as trustee, filed his petition to be substituted as sole complainant. The court sustained the demurrers and substituted Buell, trustee, as sole complainant, and the bill was then amended by eliminating complainants and substituting Buell, trustee, in their stead. To the bill as thus amended, defendants filed general and special demurrers. These demurrers were sustained. Thereupon the original and the substituted complainants elected to stand by the bill as originally filed and as amended, whereupon the court dismissed the bill for want of equity. We shall rest our decision upon two questions:

First. Was Buell, the trustee in bankruptcy of the U. S. Kellastone Company, entitled to be substituted as complainant, thereby eliminating from the case the complainants who brought the bill?

Second. Does the bill, by either the original complainants or the substituted complainant, disclose any facts which, being confessedly true, call for the relief prayed in a court of equity?

It is essential to bear in mind that the U. S. Kellastone Company is a corporation existing in virtue of the laws of the State of Oklahoma and that the claims by the parties must be admeasured in this cause within such laws. In fact, the right to relief is predicated, by the averments of the bill, upon section 1263 of article III, ch. 15 of the 1910 Revised Laws of Oklahoma, and of section 39, article IX of the Oklahoma Constitution. These sections of the statutes and Constitution of Oklahoma are before us as facts, and as the demurrers in law admit their verity, we shall so treat them.

First. The claim sought to be enforced by the bill against defendants is not a liability against them as stock subscribers, but is to enforce a claimed liability grounded on the alleged fact that defendants unlawfully acquired from the corporation 3,000 shares of its stock. Section 1263 of the Oklahoma statutes set out in the bill, provides, *inter alia*, that * * * any creditor of the corporation may institute joint or several actions against any of its stockholders that have not wholly paid the capital stock held by him * * *. The liability of each stockholder is determined by the amount unpaid upon the stock or shares owned by him at the time such action is commenced, and such liability is not released by any subsequent transfer of stock. * * * This legislation was enacted in virtue of section 29 of the Oklahoma Constitution above cited.

In construing a similar statute of New York, the Circuit Court of Appeals said *In re Jassoy Co.* 178 Fed. 515: "The bankrupt being a New York corporation, the right to levy assessment or to take other action to collect from its stockholders must be found in the statutes of this State." The New York statute referred to is not in its essence unlike that of Oklahoma. In commenting on the New York statutes the court said: "These sections give to the corporation itself no claim and no right of action against stockholders for the amount unpaid on stock held by them,"

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—meaning the stockholders. The court further said: “There can be no doubt that the appointment of the receiver did not vest in him a right which was personal to the creditors.” The doctrine of the *Jasoy Co.* case, *supra*, is sustained by ample authority and is controlling of the case at bar. The right of action against the defendants, if any exists, is in the creditors of the U. S. Kellastone Company and not in its trustee in bankruptcy.

Bell v. Farwell, 176 Ill. 489, holds to the same doctrine. No common-law right is involved, as stock subscriptions were unknown to the common law. The Supreme Court of Oklahoma has advanced the same logic and reasoning in deciding between the rights of creditors and those of a trustee in bankruptcy, in *West v. Bank of Lahoma*, 16 Okla. 508.

The fact that the Kellastone Company was authorized to transact business in this State, and did so, does not change the situation or operate to give rights to the trustee in bankruptcy which the law of Oklahoma gives exclusively to creditors. *Mead v. Davies*, 84 Ill. App. 558.

While it was error to substitute Buell, trustee, as complainant in the bill and to eliminate therefrom the creditor complainants, yet the ultimate conclusion at which we have arrived on the whole record is in no wise thereby affected.

Second. The stockholders’ liability sought to be enforced by the bill in this case does not arise through a subscription to the stock of the Kellastone Company, but is a stock owners’ liability, claimed by the bill to be enforceable under the Constitution and the statutes of the State of Oklahoma.

It is well settled that an action cannot be maintained in the courts of this State against a resident stockholder of a foreign corporation upon a liability predicated upon the statutes of the State granting the charter; such liability must be determined by the law

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of the State which gave it its corporate vitality. *Tuttle v. National Bank of Republic*, 161 Ill. 497; *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177; *Hayward v. Sencenbaugh*, 141 Ill. App. 395.

Neither will a special remedy provided by legislation in a foreign State be enforced in this State upon the principle of comity.

A bill to enforce a liability such as that claimed against defendants cannot be enforced in the courts of this State until, by appropriate proceeding in the Oklahoma courts, the relations of the creditors, stockholders and corporation to each other have been determined and the proportionate share of the indebtedness to be borne by each solvent stockholder has been ascertained. The liability of the stockholder defendants is, by no averment of the bill, alleged to be contractual, but, if it exists, is admittedly a statutory liability, and under the statutes of Oklahoma that remedy is vested, not in the corporation, but in any creditor. In such an action the corporation and its stockholders are necessary parties, because it is essential that their relations to each other and their liability shall be established.

Edwards v. Schillinger, 245 Ill. 231, and cases of like import, cited by appellants, are not in point in the case at bar, for the reason that those cases proceeded against stockholders to enforce payment of their liability for unpaid stock subscription, and rest for the jurisdiction of the court upon an entirely different basis to that of the case at bar. Here the Kellastone Company could not enforce any claim against the stockholder defendants by reason of their dealings in acquiring the stock from the company. That right, if it exists, is in the creditors, under the Oklahoma statutes.

As we have concluded that the bill neither as originally filed nor as amended by the interpolation of Buell, trustee, as complainant, states any fact of which

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the Circuit Court had jurisdiction to decree any relief, the bill, both in its original and amended form, is obnoxious to the demurrers interposed, and therefore the decree of the Circuit Court is affirmed.

Affirmed.

Edwin D. Buell, Trustee, Appellant, v. Ernest H. Kastor et al., Appellees.

Gen. No. 21,258. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Bill by Edwin D. Buell, as trustee in bankruptcy of the United States Kellastone Company, a corporation, complainant, against Ernest H. Kastor, Richard H. Kastor, Aaron Bodenweiser and Frederick W. McKinney, defendants, in the Circuit Court of Cook county. Decree sustaining a demurrer and dismissing the bill affirmed on the authority of *Smith v. Kastor*, No. 21,259, *ante*, p. 458.

SILBER, ISAACS, SILBER & WOLEY, for appellant; CLARENCE J. SILBER, of counsel.

HARRIS F. WILLIAMS and CHARLES SCRIBNER EATON, for appellees.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Brown & Co. v. Hisgen, 195 Ill. App. 465.

**William H. Brown & Company, Defendant in Error,
v. H. F. Hisgen, Plaintiff in Error.**

Gen. No. 21,475. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the October term, 1915. Affirmed. Opinion filed December 6, 1915.

Statement of the Case.

Action by William E. Brown & Company, a corporation, plaintiff, against H. F. Hisgen, defendant, in the Municipal Court of Chicago. To reverse a judgment for plaintiff, defendant prosecutes this writ of error.

VICTOR A. G. MURRELL, for plaintiff in error.

LITZINGER, MCGURN & REID, for defendant in error.

MR. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 26*—*what omissions render statement insufficient.* On a writ of error to review a judgment of the Municipal Court of Chicago, a document certified by a judge of that court to be a "Statement of facts appearing upon the trial * * * and all questions of law involved * * * and the decisions of the court upon all such questions of law," held neither "a correct statement of the facts appearing on the trial" nor "a correct stenographic report of the trial," within the meaning of the Municipal Court Act, sec. 23, cl. 6 (J. & A. ¶ 3335), where it appears that such statement merely contains the testimony of witnesses in narrative form without a statement of the questions of law involved or the decisions of the court thereon, and where it does not appear that the evidence recited was all the evidence heard or proffered at the trial.

2. MUNICIPAL COURT OF CHICAGO, § 26*—*when insufficient statement stricken.* On a writ of error to review a judgment of the Municipal Court of Chicago, where a document purporting to be a "Statement of facts appearing upon the trial" does not comply

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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with the provisions of the Municipal Court Act, sec. 23, cl. 6 (J. & A. ¶ 3335), requiring to authorize such review that the trial judge sign and place on file either "a correct statement of the facts appearing on the trial," or "a correct stenographic report of the trial," a motion by appellee to strike will be allowed by the Appellate Court, for the reason that such a document presents nothing for review.

**Bernhard Weinstock, Appellee, v. Harry Manaster and
Herman M. Lipman, Appeal of Herman M. Lipman,
Appellant.**

Gen. No. 19,791. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed December 8, 1915.

Statement of the Case.

Action by Bernhard Weinstock, plaintiff, against Harry Manaster and Herman M. Lipman, defendants, in the Circuit Court of Cook county, to recover for the alleged negligence of defendants in excavating upon land adjoining that of plaintiff, and thereby causing damage to plaintiff's building. From a judgment for plaintiff on a verdict of the jury for \$675 against defendant Lipman, defendant Lipman appeals.

Defendant Manaster, who was the owner of a lot adjoining a building owned by plaintiff, engaged defendant Lipman to construct a building on his lot. The latter made an excavation on the lot for foundation and basement purposes. The plaintiff claimed that defendant Lipman did the excavating in a negligent and unskilful manner and thereby caused an injury to his building.

The court, at the instance of the plaintiff, gave to the jury the following instruction:

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“The court instructs the jury, as a matter of law, that the owner of land has a right to have the soil of his premises sustained by the lateral support of the natural soil of the adjoining land; and that while this right does not extend to the support of any additional weight which the owner of the soil may place upon it, such as a building, still the law is that the adjoining landowner is making excavations on his land must do so in a reasonably careful and skilful manner, so as to avoid doing any unnecessary injury to the building; and in this case, if you find from the preponderance of the evidence that the defendants made an excavation wholly within the lot owned by the defendant Manaster, and that in making such excavations they failed to use reasonable and ordinary care or skill, as charged in the declaration, and that by reason of such failure of the defendants to use such reasonable care and skill, the building of the plaintiff was damaged, then your verdict should be for the plaintiff.”

LOUIS ZIV, JOHN C. KING and JAMES D. POWER, for appellant.

MAX LUSTER, for appellee; J. AMBROSE GEARON, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

NEGLIGENCE, § 221*—*when instruction ignoring negligence of plaintiff improper.* In an action to recover for damages caused to plaintiff's building by negligent excavation by defendant, an instruction, based on the theory that the excavation was made wholly on land adjoining that of plaintiff, which directs that in case the jury find that defendant failed to use reasonable and ordinary skill in making the excavation complained of they shall find for plaintiff, *held* erroneous, where there is evidence tending to show that but for such failure on the part of plaintiff such injury would not have occurred, in that such instruction entirely withdraws from the con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sideration of the jury the questions whether plaintiff exercised ordinary care to protect his building, and whether such failure contributed proximately to the injury sought to be recovered for.

**Minnie C. Painter, Appellant, v. Howard Durham,
Appellee.**

Gen. No. 20,964. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and judgment here. Opinion filed December 8, 1915. Rehearing denied December 20, 1915.

Statement of the Case.

Action by Minnie C. Painter, plaintiff, against Howard Durham, defendant, in the Municipal Court of Chicago, to recover on a contract for services. From a judgment for plaintiff for \$4.26, plaintiff appeals.

This was an action of the first class in the Municipal Court of Chicago, brought by the appellant (hereinafter called the plaintiff) against the appellee (hereinafter called the defendant) to recover a balance of \$955.26, and interest, alleged to be due the plaintiff for services as a "graduate professional nurse," rendered to the defendant under an alleged contract. Plaintiff's statement of claim, as amended, alleges, in substance, that she rendered services to certain members of the defendant's family as a "graduate professional nurse," for a period of eighty-one weeks, from March 16, 1908, to and including October 19, 1909 (except two weeks, from July 25, 1908, to August 10, 1908), at an agreed rate of \$25 per week, making a total of \$2,025; that the defendant was entitled to credit for payments aggregating \$1,069.74, leaving a balance due to plaintiff of \$955.26, with interest. The defendant filed an affidavit of merits in which he denied the

employment of the plaintiff for a longer period than seventy-nine weeks; denied any contract or agreement with the plaintiff to pay her at the rate of \$25 per week, or that he ever ratified any such alleged agreement; and averred that there was never any contract or agreement as to the rate of pay of the plaintiff; that she was entitled to payment only at a reasonable rate for the nature and kind of services performed; that plaintiff rendered services as a "graduate professional nurse" for twenty-six weeks only, and that for such service \$25 per week is reasonable, making a total of \$650; that for the remaining sixty-three weeks plaintiff rendered services only as a practical or untrained nurse, for which \$8 per week is reasonable and ample compensation, making a total of \$424; that plaintiff earned for her entire services to the defendant a sum not exceeding \$1,074; that defendant has paid to plaintiff \$1,069.74, leaving a balance of \$4.26 due the plaintiff.

The defendant testified as follows: "That on the 9th or 10th of May, 1909, Miss Painter rendered me a statement and asked for some money. I had been giving her money as she asked it during this time. The statement showed that I owed her at the rate of \$25 a week a little over \$1,000. I wrote Miss Painter a check for \$300. I told her I had no idea she would charge me \$25 a week for every week she had been with me, that I thought it was unfair, that I could not afford to pay it, that I could not afford to keep her at that rate and that if she was going to stay with me any longer she would have to reduce her bill and reduce her charge for the future. That is the payment appearing on statement of claim under date of May 11, 1909. The Court: Q. What did she say when you told her she would have to reduce her bill? A. She said she didn't see how she could do it, etc., but I told her I could not afford to keep her any longer at that rate. It was a pleasant friendly conversation and we left it that

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way, that I could not afford to pay it." The defendant further testified that he never at any time during the period of employment told the plaintiff that he considered her as anything else than a professional nurse; that after the said conversation he permitted the plaintiff to continue in her work and nothing further was said or done in reference to her work or pay.

ALEXANDER J. INNES, for appellant.

CHARLES H. WELLS, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 81*—*when compensation for continued services presumed to be same as formerly.* Where plaintiff performs services as "a graduate professional nurse" for defendant for a period during which defendant without objection pays plaintiff at stated rate of compensation, and where after such period plaintiff continues to perform services and defendant continues to accept such services without giving notice of any change in such rate, the rate of compensation for such continued services is presumed to be the same as for those for which defendant paid, although such continued services may be slightly different and less exacting than formerly, provided that during such continued services plaintiff was expected at all times to hold herself in readiness to perform the same services as formerly, if required.

2. MASTER AND SERVANT, § 81*—*when employee presumed to have assented to new contract.* If after notice of a proposed change in the terms of an employment an employee continues in the service of an employer without objection, he is presumed to have assented to the new contract and that subsequent services were rendered thereunder.

3. MASTER AND SERVANT, § 84*—*when evidence insufficient to establish assent by employee to change in terms of employment.* In an action to recover for services, where after an objection by the employer to the rate of compensation which had previously been paid to the employee and a request for a reduction in the rate charged the employee continued in the service of the employer, evidence examined and *held* insufficient to warrant an inference that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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after such objection and request the employee assented to a change in the terms of the employment.

4. **APPEAL AND ERROR, § 1802***—*when judgment reversed without remanding.* Where a judgment must be reversed as being entered on a wrong theory of the law, and the amount due plaintiff appears with certainty from the record, judgment will be entered in the Appellate Court for the amount which plaintiff is entitled to recover, and the cause will not be remanded.

**Horace H. Stoddard, Appellee, v. Illinois Improvement
& Ballast Company, Appellant.**

Gen. No. 20,972.

1. **MINES AND MINERALS, § 22***—*when covenant to work quarry implied.* Where a lease demises land for the purpose of quarrying stone, and contains a covenant to pay to lessor in lieu of rent a royalty of a stated amount on each 2,500 pounds of stone removed therefrom under the terms of the lease, the law implies a covenant on the part of lessee and his assigns to work the demised premises with reasonable diligence and in a proper manner so that lessor may receive the contemplated returns from the lease.

2. **MINES AND MINERALS, § 22***—*when right to use land for other purposes not excuse for failure to work quarry.* Where a lease demises premises for the purpose of quarrying stone, it is immaterial whether or not lessee had also the right to make use of the land for other purposes, such as for cultivation, such right if possessed not tending to excuse lessee for failure to perform the duty of working the quarry with reasonable diligence, and such fact not being competent in mitigation of damages in an action to recover for such failure.

3. **LANDLORD AND TENANT, § 415***—*when assignee of lease takes subject to obligations of assignor.* In an action to recover for breach of the covenants of a lease whereby premises were demised by plaintiff for the purpose of quarrying stone, where defendant is the assignee of the original lessee, the fact that defendant, in accepting such assignment, did not expressly assume and agree to perform the covenants imposed by the lease on the original lessee is immaterial, it appearing that defendant based his right to possession of the demised premises on the lease, for the reason that defendant stands

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in the shoes of such lessee and is thereby precluded from asserting that it is not bound by the duties and obligations of such lessee as determined by the lease.

4. PLEADING, § 117*—*when allegations not denied stand as admitted.* In an action to recover for breach of the covenants of a lease, demising premises for the purpose of quarrying stone, which action was originally commenced in the Municipal Court of Chicago, and where plaintiff's pleadings allege that at the time defendant entered into possession under an assignment of such lease the demised premises contained large quantities of stone suitable for quarrying, such allegations stand admitted under the rules of such court where they are not denied in defendant's affidavit of merits, and where defendant admits that it never removed any stone from such premises.

5. PLEADING, § 117*—*when evidence to support undenied allegation not necessary.* In an action to recover for breach of the covenants of a lease demising premises for the purpose of quarrying stone, defendant cannot assert in defense that the demised premises contained no stone fit for quarrying, nor is plaintiff required to offer any evidence to prove such fact in order to maintain the action, where defendant does not set up such defense in its affidavit of merits, for the reason that such defense is thereby waived and is unavailable at the trial.

6. MINES AND MINERALS, § 35*—*when lessee estopped to set up unsuitability of land for purpose for which leased.* In an action to recover for breach of the covenants of a lease demising premises for the purpose of quarrying stone, which demise was until "January 2, 1913, or as long thereafter as the property is suitable for quarrying purposes," defendant is precluded from asserting that there is no evidence that the demised premises contain stone suitable for quarrying purposes which with reasonable skill and diligence might have been removed with profit where defendant retained possession of such premises after such date, it also appearing that defendant's assignor worked the quarry with profit to plaintiff.

7. MINES AND MINERALS, § 35*—*what instruction as to measure of damages for breach of quarry lease proper.* In an action to recover for breach of the covenants of a lease demising premises for the purpose of quarrying stone, wherein lessee in lieu of rent agreed to pay a royalty on each 2,500 pounds of stone removed therefrom, and where the injury sought to be recovered for consisted in the failure of defendant to work the quarry, an instruction that the measure of damages was the difference between the amount of agreed royalty on the stone which defendant ought to have

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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removed and on the amount actually produced, if any, *held* to state the correct rule of law.

8. MINES AND MINERALS, § 22*—*when lessee not relieved from liability.* Lease providing for payment of royalty on stone quarried construed as not relieving lessee from obligation to work quarry merely because it could not be worked at a profit.

9. APPEAL AND ERROR, § 479*—*when error in instruction not reviewable.* Where a party fails in the trial court to make specific objection to an instruction, such party is precluded from asserting on appeal that such instruction was erroneous.

10. CONTRACTS, § 177*—*when construction to effectuate intents of parties favored.* In an action to recover for breach of the covenants of a lease demising premises for the purpose of quarrying stone, where defendant failed to use reasonable diligence in operating the quarry, the fact that during defendant's occupation of the premises under the lease no stone was removed by it is competent on the question of damages, for the reason that in such case defendant could not retain possession of the demised premises and arbitrarily refuse to operate the quarry, as such a construction of the contract would be absurd, and lead to results clearly not contemplated by the parties.

11. MINES AND MINERALS—*when instruction as to measure of damages properly refused as misleading.* In an action to recover for breach of the covenants of a lease demising premises for the purpose of quarrying stone, whereby lessee agreed in lieu of rent to pay plaintiff a royalty on each 2,500 pounds of stone removed, an instruction that the amounts paid plaintiff by the original lessee and an assignee of such lessee, both of whom operated such quarry and under assignment from whom defendant derived its title to occupy the demised premises, were not the measure of plaintiff's damages in this action *held* properly refused, as tending to mislead the jury, as though such amounts were not the measure of plaintiff's damages in this action, such amounts were evidence competent to be considered by the jury in connection with other evidence in determining how much stone, if any, defendant could have removed by the exercise of reasonable diligence.

12. MINES AND MINERALS, § 35*—*when damages not excessive.* In an action to recover for breach of the covenants of a lease whereby plaintiff demised premises to defendant's assignor for the purpose of quarrying stone, which lease contained a covenant to pay to plaintiff in lieu of rent a stated sum on each 2,500 pounds of stone quarried under the lease, a verdict for plaintiff for \$2,500, *held* reasonable under any view of the evidence, where it appeared that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant breached the lease by retaining possession and failed to work the quarry at all for a period of about three and one half years prior to the bringing of the action.

Appeal from Municipal Court of Chicago; the Hon. HENRY C. BETTLER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915.

Statement by the Court. Horace H. Stoddard, appellee, hereinafter called the plaintiff, brought suit against the Illinois Improvement & Ballast Company, a corporation, appellant, hereinafter called the defendant, in the Municipal Court of Chicago, in an action of the first class. The case was tried before a court and jury, and there was a verdict returned awarding the plaintiff \$2,500 damages. Judgment was entered upon the verdict and the defendant has prayed this appeal.

In the amended statement of claim it is alleged: Plaintiff's claim is for the recovery of certain damages resulting from the defendant's failure to comply with a certain lease to develop and quarry rock in certain premises theretofore leased by the defendant (a copy of which lease is attached and made a part of said statement); which said lease was on January 2, 1903, executed by Bales & Son, who in said indenture covenanted to pay the plaintiff for rent of said premises, at the rate of six cents per yard for stone removed from said premises and (after the first year) nine cents per yard for rubble stone; that said leasehold was to continue to January 2, 1913, or as long thereafter as the property was suitable for quarrying purposes; that Bales & Son entered upon said premises and found therein stone suitable for quarrying purposes and quarried the same, and thereafter assigned said lease to M. J. Carpenter, doing business as the La Grange Stone Company, who quarried from said premises large quantities of stone until December, 1910, paying to the plaintiff as royalties and rent upon the said premises \$12,046.08; that on December 6, 1910, Carpen-

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ter assigned said lease to the defendant who thereupon took possession of the premises and all the improvements thereon; that the defendant was under a duty to proceed with due diligence to develop the said premises, which then contained and still does contain large quantities of stone for quarrying purposes; that the defendant by reason of said assignment became liable to fulfil and carry out the obligations of its predecessors to proceed and develop said land under the terms of said lease; but the defendant disregarded its implied duty in that behalf under said lease, and wholly failed and refused and still continues to fail and refuse to proceed and develop said premises for quarrying purposes, contrary to the full intent of said lease and the covenants therein expressed and implied. By reason whereof plaintiff has received nothing for the use and occupation of said premises by defendant since December 1, 1910, and has received no rent or royalties since that date and the plaintiff has also been damaged because of the defendant's failure to quarry rock from said premises; to the damage of the plaintiff in the sum of \$7,500.

The defendant's affidavit of merits alleges: "1. That the only obligation of the defendant to the said plaintiff arises under a certain lease and assignments thereof to it, copies of which are to the answers of this defendant to interrogatories attached, pursuant to which this defendant went into possession of the premises by said lease demised on, to-wit: December 6, 1910; that since which time this defendant has not removed from the said premises any stone of any kind and under which lease and assignments thereon this defendant was not required to quarry stone from said premises. 2. That this defendant did not promise or undertake with the plaintiff that it would operate or develop the premises conveyed by said lease by quarrying stone therefrom. 3. That the entire obligation of the defendant is in the terms of said lease and assign-

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ments thereof referred to under the heading 1 above. 4. That the defendant did not promise the plaintiff that it would develop and quarry stone upon the land and with due diligence fully develop the said premises which were by said lease and assignments thereof referred to under heading 1 conveyed to this defendant. 5. Plaintiff has not suffered any damage as set out in said statement of claim. 6. That defendant is not indebted in any amount as set out in said statement of claim. 7. That there is no custom of the country where the land or premises conveyed by said lease and assignments thereof, referred to under heading 1 above, were situated that defendant should develop or quarry stone upon said lands or premises."

The plaintiff is the owner of a 480-acre farm near La Grange, Cook county, Illinois. On January 2, 1903, he and Bales & Son entered into a lease, the material portions of which are as follows:

"This indenture made this 2nd day of January, 1903, between H. H. Stoddard, party of the first part, and L. Bales & Son, party of the second part WITNESSETH:

That Stoddard in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by Bales & Son, their executors, administrators, successors and assigns, has demised and leased to Bales & Son, a tract of land (describing it) containing 10 acres more or less in Cook County, Illinois.

To have and to hold said premises with the appurtenances unto Bales & Son, their executors, successors and assigns from January 2, 1903, until January 2, 1913, or as long thereafter as the property is suitable for quarrying purposes.

Said Bales & Son in consideration of the leasing of said premises covenant and agree with Stoddard, his heirs, etc., to pay Stoddard as rent for said demised premises, the sum of six cents per yard of 27 cubic feet, or 2,500 pounds, for stone removed from the above described premises; and it is further agreed after the first year if good rubble stone is found and sold, it is to be paid for at the rate of nine cents per 2,500

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pounds or cubic yard, payable quarterly on the first days of January, April, July and October of each year, during said term.

Stoddard is to have the privilege of examining the books of Bales & Son whenever wanted, after payments are due to verify the accounts rendered.

It is agreed by Bales & Son, their heirs, etc., that the whole amount of rent reserved and agreed to be paid for said demised premises and each and every installment thereof shall be and is hereby declared to be a valid and first lien upon any and all buildings and improvements on said premises, or that may at any time be erected on said premises by Bales & Son, their heirs, etc., and upon his or their interest in this lease and the premises hereby demised."

On August 15, 1905, this lease was assigned by Bales & Son to Myron J. Carpenter and his assigns; and on December 6, 1910, it was assigned by Carpenter to the defendant company.

KNAPP & CAMPBELL, for appellant; JOHN R. COCHRAN, of counsel.

EARL J. WALKER, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The following are the only grounds urged by the defendant for the reversal of the judgment: (1) "The motion made at the close of all the evidence to direct a verdict for the defendant should have been granted." (2) "Appellant did not expressly or impliedly covenant and agree with the appellee to remove stone from the demised premises." (3) "The burden of proof was upon the appellee to establish that the demised premises contained stone suitable for quarrying purposes, and by the exercise of reasonable skill and diligence could have been profitably removed." (4) "The court erred in the admission and exclusion of evidence." (5) "The court erred in its charge to the

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jury and in its refusal to charge as requested by appellant.”

As to the first of these contentions, the defendant insists that it was error for the court to refuse to direct a verdict for the defendant, for the reason that the plaintiff predicated his right of recovery in the present case solely upon the theory that the lease in question was for a single purpose, viz., to develop and quarry rock; whereas, under the terms of the lease, the defendant had the right to make other uses of the premises. It is a sufficient reply to this contention to say, that under the terms of the said lease, the law implied a covenant on the part of the lessees and their assigns to work the quarry with reasonable diligence, and in a proper manner, so that the lessor might receive the returns contemplated in the lease (*Watson v. O'Hern*, 6 Watts (Pa.) 362; *In re Koch's Appeal*, 93 Pa. St. 434; *Daughetee v. Ohio Oil Co.*, 263 Ill. 518; *Id.* 151 Ill. App. 102; 1 Taylor on Landlord and Tenant [1904] sec. 369); and it is no answer to the present suit to say that the defendant had the right under the lease to till the land, or make other uses of the premises than removing stone therefrom. If such a right existed, it would not affect the defendant's duty to work the quarry, nor would it tend to lessen the damages of the plaintiff in the present suit. We do not wish to be understood, however, as intimating from what we have said, that we think that the defendant, under the terms of the lease, had the right it claims.

In support of its second contention, the defendant relies upon *Chicago & W. I. R. Co. v. Chicago & E. I. R. Co.*, 260 Ill. 246. That decision is not an authority in favor of the defendant's present contention for the reason that the lease in that case was of a different character from the one now under consideration. The cases that we have cited in passing upon the defendant's first contention are adverse to its present one and dispose of it.

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In connection with its second contention the defendant argues that: "It by no means follows that if the appellee's contention, that the lease contains certain implied covenants be sustained, that he is entitled to relief which the lower court granted him as against this appellant. The assignment to the appellant by Carpenter was a mere assignment of Carpenter's rights, but without any assumption on the part of the appellant of Carpenter's obligations, if any, under the lease. The same is true of the assignment by Bales & Son to Carpenter. Therefore, the judgment below cannot be sustained upon the ground that the appellant had contracted with the appellee and that by reason of certain express provisions of the contract other implied provisions must be read into it. What the appellee's rights may be against Bales & Son growing out of the contract which he made with them is not, of course, a question that is involved in this case. Had the appellant assumed and agreed to perform the covenants and agreements of Bales & Son an entirely different question would be presented." The fact that the defendant bases its right to possession of the premises on the lease would seem to preclude it from taking this position. The defendant, clearly, stands in the shoes of the original lessee, and its rights, duties and obligations are to be determined by the lease entered into by the plaintiff and Bales & Son.

As to the third contention of the defendant it is said, that "it is alleged in the statement of claim at the time the appellant took possession of the demised premises the property contained large quantities of stone suitable for quarrying purposes. The appellee having alleged that the quarry contained stone that could have been, but was not, quarried, undertook the burden of proving those facts. The facts so alleged are a necessary part of the plaintiff's cause of action. It is obvious that if there was no stone to be quarried there was no obligation to quarry, and therefore, the

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plaintiff was not damaged.” The plaintiff’s statement of claim sets forth that “Bales & Son entered upon the said premises and found therein stone suitable for quarrying purposes and quarried said stone and thereafter assigned said leasehold interest to Myron J. Carpenter, * * * and said lessee and assignee did quarry from said premises large quantities of stone until the month of December, 1910, paying to the said plaintiff herein as royalties and rent upon the said premises the sum of \$12,046.08 * * * that on to-wit: the 6th day of December, 1910, the said Myron J. Carpenter by an instrument in writing assigned the said lease to the defendant herein who thereupon took possession of the said premises * * * which then and still contains large quantities of stone suitable for quarrying purposes.” As these allegations of fact are not denied in the defendant’s affidavit of merits, they stand admitted, under the rules of the Municipal Court introduced in evidence. *The sole defense stated by the defendant in its affidavit of merits, save the one that the plaintiff was not damaged, is, in substance, that under the terms of the lease and assignments thereof, and regardless of the question as to whether the defendant could quarry stone profitably, the defendant was not required to remove stone from the premises and develop the premises by quarrying stone therefrom; and the defendant admits in the said affidavit that it has never removed any stone from the premises.* All defenses, the nature of which are not stated in the affidavit of merits, are considered waived by the defendant and are unavailable on the trial. *Kadison v. Fortune Bros. Brewing Co.*, 163 Ill. App. 276; *Hamill v. Watts*, 180 Ill. App. 279; *West Coast Timber Co. v. Hughitt*, 185 Ill. App. 500. The defendant did not interpose as a defense that it could not profitably remove the stone from the premises (in fact, it admits that it never made any effort to do so), and it predicates its sole defense upon the terms of the

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lease and the assignments thereof. Its defense, save in the matter of damages, only called for a construction of the lease and assignments. It appears that Carpenter worked the quarry with profit to the plaintiff, but that as soon as the defendant obtained possession of the premises from Carpenter no more stone was removed, but the defendant still insists on holding possession of the premises, without making any effort to work the quarry and without paying any royalty to the plaintiff. The lease provided that the lessee should have and hold the premises until January 2, 1913, "*or as long thereafter as the property is suitable for quarrying purposes.*" The defendant retained possession of the premises after January 2, 1913, by virtue of the aforesaid clause, and it, therefore, seems rather inconsistent, to say the least, that it should contend in this case that there is no evidence to establish the fact that the premises contains stone suitable for quarrying purposes, that by the exercise of reasonable skill and diligence could be profitably removed.

As to the contention of the defendant that the court erred in the admission and exclusion of evidence, we are satisfied, in view of the sole defense set up in the affidavit of merits and the nature of the same and the admitted facts in this case, that it is without the slightest merit. The statement of counsel that "according to the theory of the trial judge, it was the appellant's duty to get out this stone even if, after it was gotten out, it could not be sold at a price which would yield a profit," and that because of the said theory the defendant was not allowed to show that it could not work the quarry at a profit, is not warranted by the record. Both in the oral charge and by statements made during the course of the trial, the trial court held that if the defendant by the exercise of reasonable skill and diligence could not operate the quarry at a profit, the case of the plaintiff failed. We are of the opinion that the court erred in so holding. Under the lease in

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question, the defendant was not released from its obligation to work the quarry merely because the same could not be worked at a profit; and furthermore, the defendant persisted in retaining possession of the premises by virtue of the lease, and we think it is thereby precluded from claiming that the quarry could not be operated at a profit, especially in view of the clause in the lease (to which we have heretofore referred) under which the defendant held possession of the premises, after January 2, 1913. It would be a strange doctrine if the defendant, by virtue of the lease, could hold possession of the premises, in the manner that it did, and at the same time be heard to say that the quarry could not be worked at a profit. The nature of the sole defense interposed in the affidavit of merits would also prevent the defendant from now asserting that the quarry could not be worked profitably.

The defendant contends that the court erred in giving the following part of the oral charge to the jury: "You are instructed that if you find for the plaintiff you have a right to and may consider the amount of the plaintiff's damages and in arriving at your verdict you should subtract from the amount of stone which you find should have been quarried from the premises during the period from December 6, 1910, to September 10, 1913, the time of bringing this suit, the quantity actually produced, if any, and allow the plaintiff 6 cents per yard of such difference." As the defendant made no specific objection to the aforesaid part of the charge, at the time it was made, it is not now in a position to complain of the same. In any event, there is no merit in the complaint as the trial court announced the correct rule. *Daughetee v. Ohio Oil Co.*, 151 Ill. App. 102.

The defendant contends that under the charge to the jury the latter were not authorized to consider, in estimating the damages, the fact that no stone had

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been removed from the premises. This contention is answered by the Supreme Court and adversely to the defendant, in *Daughetee v. Ohio Oil Co.*, 263 Ill. 518-527.

The defendant contends that the court erred in the following portion of the charge: "The jury are instructed that the burden of proving by a preponderance of the evidence that from the 6th day of December, 1910, to the 10th day of September, 1913, the defendant in this case could, by the exercise of reasonable skill and diligence, have operated the quarry referred to in the evidence in this case and have made a profit by such operation over and above all the cost of operating said quarry and of selling the product thereof, rests, with the plaintiff, and that if the plaintiff failed to show by a preponderance of the evidence that said quarry could be operated during said time at a profit over and above the cost of operation and selling the product thereof, then they should find a verdict for the defendant." This charge would have been erroneous for reasons that we have heretofore stated. However, as we have previously said, the trial court did charge the jury that if they believed from the evidence that the defendant could not by the exercise of reasonable diligence and skill during the said period have made a profit thereby over and above all the costs of operating the quarry and of selling the products thereof, then they should find the issues for the defendant.

The defendant next contends that the court erred in refusing to charge the jury, as requested by the defendant, as follows: "The jury are instructed that if under the evidence and the instructions in this case they find a verdict for the plaintiff, then they are further instructed that the amount heretofore paid to the plaintiff by those who operated the quarry described in the evidence in this case prior to the 6th day of December, 1910, is not the measure of the amount of the verdict which they should find in this case, if they find a verdict

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for the plaintiff.” This charge would have tended, in our judgment, to have misled the jury. While it is true that the amounts paid to the plaintiff by Carpenter “are not the measure of the amount of the verdict” which the jury should find in this case, nevertheless, this evidence was proper for the jury to consider, together with all the other facts and circumstances in the case, in determining the amount of stone, if any, that could reasonably have been removed by the defendant. *Daughetee v. Ohio Oil Co.*, 151 Ill. App. 102.

The defendant insists that under the lease and the assignment, it may retain possession of the premises in question without making any effort to remove stone from the quarry; that it may escape paying the plaintiff any royalty and may deprive him of the opportunity to work the quarry himself, or to permit others to do so. It would be a serious commentary on the law, if this position could be successfully maintained. The law, however, reads the lease differently from the defendant. The plaintiff is clearly entitled to recover; the damages awarded are reasonable in any view of the evidence (in fact, none of the defendant’s five contentions question the amount of the same), and the judgment of the Municipal Court of Chicago should be, and it is, affirmed.

Affirmed.

**Ben Abramowitz, Appellee, v. N. Langknecht,
Appellant.**

Gen. No. 20,977.

1. JUDGMENT, § 242*—*when not invalidated by abbreviations in minute.* While a minute of the proceedings in a cause is ineffective as a record of a judgment as being in conflict with section 18 of the schedule of the Constitution of 1870, requiring all judicial pro-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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ceedings to be in the English language, yet such a minute is sufficient to enable the clerk properly to enter a judgment of record.

2. JUDGMENT, § 242*—*when insufficiency of record does not affect validity of judgment.* Although the record of a judgment as it stands may be invalid, by reason of the use of abbreviations, the judgment is not thereby rendered invalid, as it is within the right and power of the judgment creditor to have a valid record of the judgment entered.

3. QUIETING TITLE, § 11*—*when relief refused for failure to do equity.* In an action in chancery to remove a cloud on title, where the cloud sought to be removed was a sale under an execution issued to enforce a judgment which complainant still owed, on the ground that the record of the same was invalid as not being in the English language, a decree relieving against the judgment without decreeing the payment of the judgment as a condition precedent to the relief granted, *held* erroneous, as until such payment is made or tendered, complainant cannot be said to have done equity, the maxim, "He who seeks equity must do equity," being applied to the case.

4. QUIETING TITLE, § 62*—*when tender of equity essential in bill.* Whenever the object of an action is to remove a cloud on title, complainant must in his bill expressly offer to do equity.

5. QUIETING TITLE, § 84*—*when relief against payment of judgment debt denied.* In a suit in chancery to remove an alleged cloud in title, consisting of a sale on execution issued to enforce a judgment, the record of which was invalid as not being in the English language, a court of equity will not relieve against the judgment where complainant has had his full day in court and where it has been adjudged that complainant owes the judgment, as equity will not aid a party to avoid payment of a debt.

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded with directions. Opinion filed December 8, 1915.

Statement by the Court. The appellee, Ben Abramowitz, filed a bill in chancery in the Superior Court of Cook county against the appellant, N. Langknecht. The bill alleged that the appellee was the owner of certain real estate (describing it) of the value of \$5,000; that on June 19, 1909, one Benjamin Glassman recovered an alleged judgment of \$200 in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Municipal Court of Chicago against the appellee, and that said judgment was thereafter assigned to Leopold Saltiel; that the only record of said alleged judgment upon which the lien and levy hereinafter set forth were and are founded was the following:

No. 39917	Tort	1000
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Papers filed and writs issued 1909

Feb. 25. Prae & state of claim fld sum iss retb

9:30 AM Mar 4 to Room No 1001

demand for tr by J. & Affdts filed

Feby 27 Sum flg Nov 2-26 J

Nov 1 Exn iss 80264 B

Plff clks fees 1100 Deft Clrk's fees 2

Blff **100** **1000 00**

Date	Papers filed and writs issued
1970	1970-1971
1971	1971-1972
1972	1972-1973
1973	1973-1974
1974	1974-1975
1975	1975-1976
1976	1976-1977
1977	1977-1978
1978	1978-1979
1979	1979-1980
1980	1980-1981
1981	1981-1982
1982	1982-1983
1983	1983-1984
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2006	2006-2007
2007	2007-2008
2008	2008-2009
2009	2009-2010
2010	2010-2011
2011	2011-2012
2012	2012-2013
2013	2013-2014
2014	2014-2015
2015	2015-2016
2016	2016-2017
2017	2017-2018
2018	2018-2019
2019	2019-2020
2020	2020-2021
2021	2021-2022
2022	2022-2023
2023	2023-2024
2024	2024-2025

Mch 4 App. fld.

June 2, 1909 Verd. Fld.

June 3, No. for new tr fid J

June 29, 09 stay of exec bond fid

June 28 Writ of error fld.

July 16 Not fld.

July 16 draft order fld.

Aug. 4 B. of ex fld

Aug 26 Trans iss to App Ct

Orders entered

Date Judge orders entered

June 2, 1909 Cottrell Tr by Jr Verd for Plff two

Hundred dollars Mo debt

N. T. end J

June 19, 1909 Cottrell Mo N. T. over. Judg on verd

“ “ “ \$200.00 & costs Bond, \$300.00

**7/16 Hume deft time fl B x ext 30 ds as per
draft ord (see spl. Book page 410).**

Date Memoranda or Postponements.

Mch. 4 09 Post to next Jury Calendar

June 2 1909 Postp June 5

June 5 1909 By agr Post June 12

June 12 Post June 19

OK transcript F. E. E. 8/4/09."

That on or about the 10th day of October, 1912, a certain *alias* execution issued upon such alleged judgment for the sum of \$200 and \$14 costs, and was delivered to Thomas M. Hunter, bailiff, who levied said execution upon the property of the appellee, and that on November 25, 1912, the said bailiff sold the premises to Leopold Saltiel for the sum of \$269.45; that the judgment so recovered was and is invalid and of no force or effect by reason of the judgment appearing of record in unintelligible abbreviations of words; that the execution founded upon such invalid judgment was void and of no effect; that thereafter the bailiff issued a certificate of levy to said Saltiel; that the alleged judgment and execution were and are invalid and of no effect; that after the issuance of the certificate of levy, Saltiel sold, transferred and assigned the said certificate to the appellant, who is now the owner of the same, and in consequence of the alleged judgment, levy and sale, the title of the said real estate has become clouded and has the effect to greatly depreciate the value of the property and to prevent its sale. The bill prayed that the levy and sale be declared null and void, and as a cloud upon the title be removed and the certificate of sale be delivered up to be canceled; that the real estate be declared free and clear of the alleged judgment, execution and sale; that defendant be restrained by injunction from taking any proceedings with reference to the certificate of sale and that he be restrained from procuring or obtaining a deed to the property and from selling or transferring the certificate of levy.

To this bill the appellant filed the following plea: That on or about the 19th day of June, 1909, one Benjamin Glassman, in the Municipal Court of Chicago, recovered a judgment against complainant in the sum of \$200 and costs of suit; that thereafter complainant appealed said case to the Appellate Court of Illinois for the First District; that on the 5th day of

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October, 1911, said judgment of said Municipal Court was affirmed by said Appellate Court; that said judgment of affirmance has not been appealed from and still stands of record in said court; that the judgment which complainant alleges to be invalid is the same judgment which said Appellate Court has affirmed; that complainant is barred from questioning the validity of said judgment of the Municipal Court by reason of the fact that said judgment was, by the Appellate Court, declared a valid judgment and that the question of the validity of said judgment is now *res adjudicata*. Thereafter the appellant filed the following additional plea in substance: That complainant by giving bond in the Municipal Court of Chicago and suing out the writ of error in the proceedings in which the complainant now complains there was error, recognized the validity of said judgment and is now estopped from questioning the validity of the same. The cause was heard upon the bill, the two pleas and proof, and a decree was entered in accordance with the prayer of the bill. From this decree the appellant appeals. The facts in the case are admitted.

SALTIEL & ROSSEN, for appellant.

B. M. SHAFFNER, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

The appellant urges two grounds for the reversal of the decree: First, that the question of the validity of the record of the judgment in the case of *Glassman v. Abromovich* is *res adjudicata* as between the parties to the present proceedings; that it is *res adjudicata*, notwithstanding the fact that the appellee did not raise the said question in the Appellate Court, for the reason that the doctrine of *res adjudicata* extends to any matter properly involved and which might have been raised and determined by the Appellate Court on the

writ of error sued out by the appellee to review the judgment of the Municipal Court in the said case; second, that the appellee in his bill does not allege that he does not owe the amount of the judgment in the case of *Glassman v. Abromovich*, nor does he offer to pay to the appellee the amount of the said judgment, or to do equity between the parties, and the decree removes the alleged cloud caused by the judgment from the property of the appellee without compelling the latter to do equity to the appellant; that the maxim, "He who seeks equity must do equity;" applies to the present case, and that the appellee should have been denied the relief he sought, unless, as a condition precedent to the granting of the same, he was made to pay the appellant the amount of the judgment in the case of *Glassman v. Abromovich*.

A judgment was rendered against the appellee in the Municipal Court of Chicago in the case of *Glassman v. Abromovich*. The complainant had that judgment reviewed by the Appellate Court of this district, and that court in its opinion (*Glassman v. Abromovich*, 163 Ill. App. 388) sustained the judgment of the lower court.

The Supreme Court held (*Stein v. Meyers*, 253 Ill. 199; *City of Chicago v. Mitchell*, 256 Ill. 236) that a certain record of the clerk of the court of a so-called judgment (the entry in that case being similar to the one now before us) was, because of the manner in which it was made, in conflict with section 18 of the schedule of the Constitution, and was therefore invalid, and of no effect, as a record of a judgment. This branch of the Appellate Court held (*Hunter v. Empire State Surety Co.*, 191 Ill. App. 634; *Phelps v. Hunter*, No. 20,889, *ante*, p. 181), that while an entry like the one in question in this case was not itself the judgment, nor the formal record of the judgment, it still was a sufficient minute of the proceedings to enable the clerk to properly enter of record the judgment in the case.

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While under the rulings of the Supreme Court, the record of the judgment in the case of *Glassman v. Abromovich, supra*, is invalid, nevertheless, it is within the right and power of the appellant to have a valid record of the judgment entered. The judgment of the court in that case is not invalid, even though the record of the same, as it now stands, is. The appellee owes the amount of the judgment that he asks to have removed as a cloud upon his title. He has not done equity, nor has he offered to do so, by paying the appellant the amount of the judgment, and it would be opposed to every principle of equity to permit him to obtain the aid he seeks, and that the decree gives him, without first compelling him to pay to the appellant the amount of the judgment. Cases, almost without number, might be cited in support of our position. We will refer to a few of them. *Winslow v. Noble*, 101 Ill. 194; *Byars v. Spencer*, 101 Ill. 429; *Chambers v. Jones*, 72 Ill. 275; *Reed v. Tyler*, 56 Ill. 288. Whenever the object of the action is the removal of a cloud on complainant's title, he must expressly offer in his bill to do equity. 32 Cyc. 1355.

The appellee relies upon the case of *Hooper v. Bank of Two Rivers*, 255 Ill. 549, in support of his contention that the complainant is not obliged to show that the judgment was unjust, nor is he obliged to pay the same, to entitle him to the relief he seeks. In that case Hooper filed a bill against the Bank of Two Rivers to remove a judgment lien as a cloud upon the title to certain real estate owned by him. It appeared that on July 10, 1907, the said bank recovered a judgment against Frederick J. Norton and Henry Rennick for \$2,193.07, which was written up by the clerk of the Municipal Court in about the same form as was followed in the present case. On July 6, 1908, an execution was issued on the judgment. On September 14, 1909, Norton was declared a bankrupt, and a trustee was appointed of his estate. At the time the judgment

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was entered and at the time he became a bankrupt, Norton was the owner of the premises in question. After Norton was declared a bankrupt, Hooper purchased the premises from the trustee and took possession thereof, and thereupon the bank threatened to sell the same on the said execution in satisfaction of the said judgment, whereupon the bill was filed. While the court held that Hooper—whose situation in that case was not like that of the complainant in the present proceedings—was entitled to have the alleged judgment lien removed as a cloud upon his title without showing that the judgment was unjust, and without paying the same, nevertheless, the court strongly intimates that if Norton and Rennick were the complainants, a different rule would apply.

The appellee in the present case was not warranted in seeking the aid of chancery. He has had his full day in court, and it has been adjudged that he owes the judgment that he calls a cloud upon his title, and equity will not aid him to avoid the payment of his debt. The decree of the Superior Court of Cook county will be reversed and the cause remanded with directions to the chancellor to dismiss the bill of the appellee for want of equity.

Reversed and remanded with directions.

Herman Cohn, Appellee, v. Flanagan & Biedenweg Company, Appellant.

Gen. No. 20,989. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 8, 1915.

Cohn v. Flanagan & Biedenweg Co., 195 Ill. App. 491.

Statement of the Case.

Action by Herman Cohn, plaintiff, against the Flanagan & Biedenweg Company, a corporation, defendant, in the Superior Court of Cook county, to recover on a written contract. From a judgment for plaintiff for \$115, defendant appeals.

The defendant contracted with St. John's Church in Jacksonville, Florida, to furnish the windows for its church, and it then entered into the following contract with the plaintiff:

**"THE FLANAGAN & BIEDENWEG COMPANY.
ARTISTS—STAINED GLASS**

Chicago, March 2, 1906.

We, The Flanagan & Biedenweg Co., agree to pay to Herman Cohn Two Hundred Dollars (\$200.00), for setting all of the glass in St. John's Church at Jacksonville, Fla., as per plans and specifications.

He, Herman Cohn, is to furnish all the necessary material excepting glass and lead, and to place same in position, including sixty-seven ventilators to the satisfaction of the committee. The work to be set in stone.

He is to use cement of the best quality obtainable in Jacksonville and the best grade of putty, if putty is selected by the committee and all work to be left clean and to the satisfaction of the church committee.

We, the Flanagan & Biedenweg Co., to be in no way held responsible for any expenses in the delay of shipment by the railroad company.

(Corporate Seal.)

**THE FLANAGAN & BIEDENWEG Co.
Joseph E. Flanagan, President (Sign)
Herman Cohn (Sign)"**

The plaintiff went to Jacksonville in March, 1906, and began work under the contract. On March 13th, after the plaintiff had completed about one-third of the work,

the committee of the said church complained that a certain portion of the glass then on the grounds was too dark in color and, according to the plaintiff, ordered him not to use the same. The plaintiff immediately telegraphed the defendant as follows: "Dark glass rejected, send other, can't wait. Coming back." The next morning he received the following telegram from the defendant: "Glass made special at factory from their sample, is correct. Don't come back unless at your own cost till further orders. Letter follows." On March 15, 1906, the plaintiff received from the defendant the following letter:

"March 13, 1906.

Mr. H. Cohn,
c/o Bond & Bours Co.,
Jacksonville, Fla.

Dear Sir:—

We received your telegram at 4:40 p. m. this day, the 13th, as follows: 'Dark glass rejected, send other, can't wait—coming back' and we wired you as follows: 'Glass made special at factory from their sample is correct. Don't come back unless at your own cost till further orders. Letter follows.' We also telegraphed Bond & Bours Co. as follows: 'Cohn telegraphed glass rejected. Too dark. Glass made from your sample at factory. Glass O. K. Cannot accept rejection on that ground. Letter follows.'

You have no authority to take it upon yourself to say anything about the glass being rejected. You are only there for the purpose of setting the glass and if there is anything of this kind to be said it must come from the people who are buying the goods. We cannot regard you but as a hired man setting the work, therefore, you should not take the responsibility of sending the telegram.

We wish to state that this glass was made special for this job from a sample received from Bond & Bours Co., Jacksonville, Fla., and was sent to the Pittsburgh Plate Glass Co. at Chicago who reserved the sample as it was sent in to the factory to be made

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after sample, the glass was made after same and is the same commercial number as known throughout the U. S. and it is the same as sample now furnished for the windows in St. John's Church, Jacksonville, Fla. I am enclosing herewith a small piece taken from the sample which I shall use for reference showing the small piece of the glass that may be compared with their sample.

The only difference there might be is the question of thickness. We have compared it with our sample and find it O. K. also compared it with the Pittsburgh Plate Glass Co.'s sample and find it O. K. There must be some mistake. But it is well known that when cathedral glass is leaded in flat lead that the flat lead has the effect of giving it a darker appearance and it is darker in appearance in large sheets than it is in small sheets.

We do not propose to accept a rejection on technicalities, furthermore, we will not stand any expense of your returning unless the officials at Jacksonville give satisfactory reasons and refuse to allow you to set the work in place in writing, this will give us an opportunity for action, but do not take any verbal reasons for stopping this order, it must be in writing and in such clear language that there will be no question on your part about returning to Chicago. We hold that we have fulfilled our contract and the responsibility will have to develop on the other end as to rejection.

Very truly yours,
The Flanagan & Biedenweg Co."

The glass objected to by the church authorities constituted only a small proportion of the total used in the work.

Immediately upon the receipt of this letter the plaintiff returned to Chicago, arriving there on March 16th. When he left Jacksonville, all the material necessary to complete the job to the satisfaction of the church people was on the ground. Telegrams and letters had passed between the defendant and the church people,

and the trouble in reference to the color of the glass was settled at once, and the church people requested the plaintiff to remain and finish the work. The plaintiff admitted that he knew that the defendant was financially responsible and well able to pay any damage that he might suffer by reason of the delay. When the plaintiff left Jacksonville, the defendant immediately sent an employee to complete the work covered by the contract with the plaintiff. This employee arrived in Jacksonville on March 17, 1906; found all the material necessary to complete the work on the ground, and the work was completed under his supervision. The defendant claimed that the work done by the plaintiff was very unsatisfactory, and that it expended, altogether, \$398.19 in completing the work the plaintiff had contracted to perform, and that after allowing the plaintiff the amount of his contract, \$200, there was a balance due the defendant of \$198.19.

WILLIAM J. STAPLETON, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

1. **CONTRACTS, § 387***—*when evidence insufficient to sustain judgment.* In an action to recover on a contract for setting glass, evidence *held* insufficient to sustain a judgment for plaintiff, it being clearly apparent from the evidence that plaintiff abandoned the contract without just cause.

2. **CONTRACTS, § 282***—*when contractor not entitled to abandon contract because of delay.* A contractor whose performance is slightly delayed by the fault of a contractee is not justified thereby in abandoning the contract.

3. **CONTRACTS, § 282***—*when party not entitled to abandon contract because of neglect.* A slight or partial neglect by one of the parties to a contract, not defeating the object of the contract or rendering it unattainable, will not justify the other party in abandoning the agreement, for the reason that to justify such abandonment

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the failure of the opposite party must be total, and that for partial noncompliance in matters not necessarily of the first importance, the party injured must seek his remedy upon the contract.

State Bank of Chicago et al., Appellees, v. John Christensen et al., on appeal of Board of Trustees of Park College, Appellant.

Gen. No. 21,024. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915.

Statement of the Case.

Action by the State Bank of Chicago and others, plaintiffs, against John Christensen and others, defendants, in the Superior Court of Cook county, to foreclose a trust deed. From a decree dismissing the original bill and the cross-bill of defendant Park College, defendant Park College appeals.

The State Bank of Chicago as trustee of the trust created by the last will and testament of John R. Parsons, deceased, filed its bill in the Superior Court of Cook county, Illinois, to foreclose a trust deed given by John Christensen and Rosalba A., his wife, to secure the payment of their promissory note for three hundred dollars. Cross-bills were filed by Kathryn Crispe, John Christensen and Park College.

In the fall of 1907, plaintiff John Christensen secured a loan of three hundred dollars from Arthur B. Pease, and gave his note, dated November 20, 1907, for the amount. The note was secured by a trust deed on the home of Christensen at 639 Root street, Chicago. Pease afterwards sold the note and trust deed to a

man named Griffin, who in turn sold it to the Thompson & Taylor Spice Company, and the note and trust deed was owned by the Thompson & Taylor Spice Company on the date of its maturity. Upon the maturity of this note, plaintiff Christensen again applied to Pease to secure for him a loan of five hundred dollars on his said property, the said three hundred dollar note to be paid out of the five hundred dollar loan and the remainder of the same to be turned over to Christensen. Christensen secured the loan of five hundred dollars from plaintiff Kathryn Crispe through Pease. Christensen gave his note for five hundred dollars, secured by a trust deed on his said property, signed by himself and wife. This loan of five hundred dollars was made with the understanding between the three parties that the said three hundred dollar note was to be paid out of the five hundred dollar loan, and that the note and trust deed given by Christensen to secure the loan of five hundred dollars was to become a first lien on his property. On December 15, 1909, Pease paid for and took up this three hundred dollar note and trust deed from Thompson & Taylor Spice Company, but he never released the trust deed securing the note, and he kept the note and trust deed in his possession; he also kept in his possession the five hundred dollar note and trust deed securing the same. On or about March 16, 1901, Caroline M. Parsons, who was then acting as the sole executrix of the last will and testament of John R. Parsons, deceased, died testate, and Walter M. Howland qualified and entered upon his duties as executor under her will. Howland received with the assets of the Caroline M. Parsons estate the assets of the John R. Parsons estate, and he thereafter acted as trustee of both estates. On March 24, 1902, Howland was relieved as trustee of said estates and Pease was appointed trustee of the same. The trust created by the last will and testament of Caroline M. Parsons, deceased, provided

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that the income of certain property should be paid to one Alice M. Babcock during her life, and upon her death the said trust property should go to defendant Park College. The will further provided that if for any reason the gift to Park College failed, the said property should go to the children of Alice M. Babcock. During the lifetime of Alice M. Babcock, at the request of Park College, and with the consent of Alice M. Babcock, Pease accelerated the trust and turned over to the said college certain cash and securities claimed by Pease to be the *corpus* of the Caroline M. Parsons trust fund. Among the securities and cash so delivered to the said college was the five hundred dollar Christensen note, with interest coupons, and trust deed securing the same. Pease remained trustee of the John R. Parsons estate until his death, April 7, 1911, when the defendant State Bank of Chicago was appointed trustee of the said estate, and obtained from Pease's executrix possession of the three hundred dollar Christensen note and trust deed securing the same. The bill filed by the State Bank of Chicago was for the purpose of foreclosing the trust deed and securing payment of the three hundred dollar note. The chancellor dismissed the bill of the State Bank of Chicago for want of equity, and his action in this regard was urged as error by the said bank.

The cross-bills and answers filed by the said Park College and Kathryn Crispe, presented the question as to the ownership of the five hundred dollar Christensen note and trust deed above referred to, the college claiming to be a holder of the same in due course. The court found the issues on this question in favor of Kathryn Crispe and against Park College, and dismissed the cross-bill of the latter for want of equity.

SCOTT, BANCROFT & STEPHENS and WILLIAM PETTIS, for appellant; JOHN E. MACLEISH and WILLARD J. DIXON, of counsel.

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CHYTRAUS, HEALY & FROST and JOHN PETER BARNES,
for appellee State Bank of Chicago as trustee.

GUSTAVE NELSON, for appellee Kathryn Crispe;
JAMES A. DONNELLY, of counsel.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion
of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1269*—*when presumption arises that evidence heard in support of bill was not included in certificate.* Where the certificate of the trial judge shows that the evidence included in the certificate was "all the evidence" heard on issues raised by a cross-bill, it must be assumed that the evidence heard in support of the bill is not included in the certificate.

2. APPEAL AND ERROR, § 1269*—*when presumed that decree is sustained by evidence.* A complainant is precluded from assigning as error a decree dismissing a bill for want of equity where the evidence heard in support of a bill does not appear in the certificate of evidence tendered, for the reason that in order to entitle itself to a reversal defendant must show that there was evidence entitling it to the relief prayed for, without which showing it will be presumed that the decree is sustained by the evidence.

3. APPEAL AND ERROR, § 1394*—*what necessary to support decree.* In chancery cases a decree granting relief must be supported by a finding of specific facts in the decree itself, or by evidence appearing in the record.

4. EQUITY, § 358*—*when decree dismissing bill for want of equity necessary.* Where there is no evidence in support of a bill or where the evidence is insufficient to warrant the court in granting the relief asked for, the proper decree is a decree dismissing the bill for want of equity.

5. APPEAL AND ERROR, § 726*—*burden of proof to show decree not warranted by evidence.* The fact that defendant secured the incorporation of affirmative findings of fact in a decree dismissing a bill for want of equity does not relieve complainant, if it assigns such decree as error, from the burden of showing by a proper certificate of evidence that the decree is not warranted by the evidence in order to entitle itself to a reversal, as the incorporation of such findings in such a decree is unnecessary, and it is therefore immaterial whether such findings be findings of fact or conclusions of law and fact.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. APPEAL AND ERROR, § 726*—*necessity of proper certificate of evidence.* Where a complainant assigns as error a decree dismissing the bill for want of equity, the burden of showing that the decree was not warranted by the evidence cannot be sustained where complainant fails to file a proper certificate of evidence.

7. BILLS AND NOTES, § 446*—*sufficiency of evidence to establish ownership of note.* On a cross-bill raising the question of title to a note secured by a trust deed of which defendant was in possession, claiming to be a holder in due course, a decree finding affirmatively that plaintiff was the owner of the note and deed and that defendant was not a holder in good faith and for value in due course and had no title thereto, *held* sustained by the evidence.

George M. Lyle, Appellee, v. Austin J. Sears, Jr., Appellant.

Gen. No. 21,606. (Not to be reported in full.)

Appeal from the County Court of Cook county; the Hon. ANDREW D. WEBB, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Appeal dismissed. Opinion filed December 8, 1915.

Statement of the Case.

Action by George M. Lyle, plaintiff, against Austin J. Sears, Jr., defendant, in the County Court of Cook county. From a judgment for plaintiff, defendant appeals.

FRANK J. HOGAN, for appellant.

CHARLES C. SPENCER, for appellee.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 671*—*when order extending time for filing bond invalid.* An order of the County Court extending the time for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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filing an appeal bond in an appeal granted by such court is invalid when made after the expiration of the time fixed by the order granting the appeal for filing the bond.

Thomas H. Kelly, Defendant in Error, v. Supreme Court of the Independent Order of Foresters, Plaintiff in Error.

Gen. No. 20,085. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 8, 1915.

Statement of the Case.

Action by Thomas H. Kelly, plaintiff, against the Supreme Court of the Independent Order of Foresters, defendant, in the Municipal Court of Chicago, to recover on a certificate of insurance. To reverse a judgment for plaintiff for \$500, defendant prosecutes this writ of error.

The defendant is a fraternal insurance society, made up of the Supreme Court of the order and subordinate courts. The defendant issued a certificate to the plaintiff for the sum of \$1,000, and the beneficiary therein named was Carrie McLaughlin, plaintiff's mother. It provided, among other things, that in case the plaintiff was totally and permanently disabled by reason of accident (of which disability the executive council was to be the sole judges), one-half of the certificate—\$500—should be paid to Kelly. The by-laws, which were made a part of the certificate, defined total disability to be that the member be "forever totally unfit to follow or direct any employment, labor, trade, occupation, business or profession." Certain dues and assessments were to be paid by the member each month, with

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a period of thirty days' grace, and it was provided that upon failure to pay within the period of grace, the member should *ipso facto* immediately stand suspended; that in case of total disability, certain proofs should be made, and that no legal action should be commenced until all remedies provided in the constitution were exhausted, and that any legal proceeding must be brought within six months after final action of the chief ranger or executive council.

Kelly continued a member in good standing until November 30, 1909, although shortly prior thereto, October 20, 1909, he was reinstated, having been theretofore suspended for nonpayment of dues. The defendant contended that on January 1, 1910, Kelly was again suspended for nonpayment of the December dues. The evidence tended to show that the plaintiff either in January or the first part of February, 1910, received a notice from John Hauseman that he had been suspended. Hauseman was the financial secretary of Court Weidner, having held such position since 1899. His duties were to collect dues and assessments and forward the same to the High Court. He and the plaintiff had been acquaintances for more than ten years.

There was a conflict in the evidence as to what took place at that time, Kelly's version being that he asked Hauseman what the notice meant; that Hauseman said he had been suspended for nonpayment of dues, to which Kelly replied that his mother, Mrs. McLaughlin, had sent the dues by mail during the latter part of December, 1909, and which dues Hauseman stated he had not received; that thereupon Kelly offered to pay the dues, but Hauseman refused to accept the money, stating that he would take the matter up with the postal authorities; that Hauseman gave him no application for reinstatement.

Hauseman's contention was that he told Kelly he was suspended; that Kelly told him his mother had

sent the money in December; that he, Hauseman, had not received the same; that he, Hauseman, said he would take the matter up with the postal authorities and notify Kelly; that Kelly did not offer any money at that time, but stated he was out of work and wanted him to wait for a few weeks; that he, Hauseman, said he could wait as long as he pleased, but not more than ninety days; that he then gave Kelly a blank application for reinstatement, which Kelly signed and took with him, and was to return when he was ready. Kelly denied this and stated that he signed the application at the hospital, as hereinafter noted. A court reporter testified that on a former trial, Kelly testified that at that meeting he received an application for reinstatement, and that he signed the same. The testimony also shows that nothing further was done in the matter until March 15, 1910, when Kelly's mother called on Hauseman where he was employed and said she came to pay her son's dues, and to have him reinstated; that, although she had paid the dues on December, she would pay them again. She returned the application blank, signed by her son, to Hauseman. Hauseman took the money and the application. The application stated that the money was received and held by Hauseman as trustee until action was taken by the head office in Toronto, and that Kelly had been suspended for nonpayment of dues for January, February, March and April, 1910. Hauseman then wrote in Kelly's pass book, which Mrs. McLaughlin had, that the December dues were then paid. He also gave her a receipt which acknowledged payment of \$8.52 from Kelly for the months of January to May, "to apply on reinstatement." At that time nothing was said by Mrs. McLaughlin that her son had been severely injured the day before.

Hauseman sent the application for reinstatement which he received from Mrs. McLaughlin on March 15, 1910, to Toronto. It was returned to him on account

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of its not being dated. Thereupon, Hauseman mailed a new application blank to Kelly. This was on or about April 3rd. He was then notified by Mrs. McLaughlin that Kelly had been injured on March 14th, and was in the hospital, and she requested Hauseman to go and see him there, which he did. Kelly was in bed at the hospital, and signed a new application blank for reinstatement. Hauseman stated that he thought nothing could be accomplished in the way of reinstatement, but that he would see what could be done. He then wrote to the High Court, and was advised by it that under all the circumstances, Kelly could not be reinstated, and liability was denied.

Mrs. McLaughlin appears to have had considerable experience with similar organizations. She had been financial secretary of an order for seventeen years. She stated that the reason she did not tell Hauseman when she paid the money that her son had been injured was that she did not think it was necessary. The evidence tended to show that Kelly or his mother had previously, on a few occasions, mailed money to Hauseman in payment of dues. The mother testified that during the latter part of December, 1909, she placed three \$1 bills in an envelope addressed to "John Hauseman, 2419 Forty-third, north of Fourth avenue, Chicago, Illinois"; properly stamped and sealed the same, and on the back thereof placed her name and address so that it might be returned in case of non-delivery; and that she then mailed the letter. Hauseman testified that he did not receive the letter or money, and that his address was "4047 North 43rd avenue."

The defendant having denied liability, and refusing to pay, this suit was brought October 5, 1910. The affidavit of merits stated that the defense was that the plaintiff had failed to pay dues and assessments falling due prior to January 1, 1910, and was suspended, and that the certificate was void. The case was tried

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before the court and jury on February 4, 1913. The jury found the issues against the plaintiff. The court afterwards granted a new trial. On September 22, 1913, by leave of court, the defendant filed an additional affidavit of merits, stating, among other things, that the plaintiff had failed to file notice, as required, of his disability; that the suit was not brought within six months from the date of his injury, and that he was not totally disabled. The case was tried before the court and jury, and a verdict of \$500 was returned in favor of the plaintiff, and judgment entered thereon.

CHARLES F. VOGEL, for plaintiff in error.

MORSE IVES and CHARLES C. BODENSTAB, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **INSURANCE, § 432***—*what constitutes total disability under accident insurance policy.* Total disability, as used in an accident insurance policy, does not mean absolute physical disability to perform any kind of work.

2. **INSURANCE, § 898***—*insufficiency of evidence to show payment of dues.* In an action to recover on a certificate of accident insurance, where at the time of the accident sought to be recovered plaintiff had been suspended by defendant, a fraternal organization, for non-payment of dues as required by the certificate, and where plaintiff claimed that the dues in question had been sent by mail to defendant's agent, a judgment for plaintiff *held* not sustained by the evidence, it appearing by a preponderance thereof that the letter containing such dues was not sent.

3. **INSURANCE, § 884***—*when evidence that member of fraternal organization signed request for reinstatement admissible.* The fact that a member of a fraternal organization who has been suspended signs a request for reinstatement is competent on the question of whether the suspension was lawful, but such evidence is not conclusive of the issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. **INSURANCE, § 804***—*when beneficiary not estopped to assert that suspension was unlawful.* The fact that a member of a fraternal organization, who has been suspended, has signed a request for reinstatement does not estop him from asserting that such suspension was unlawful.

5. **INSURANCE, § 854***—*when action on mutual benefit certificate not prematurely brought.* If when a claim is presented against defendant, a fraternal organization, it at first denies liability, an action brought without exhausting certain remedies as required by defendant's by-laws is not prematurely brought, although such by-laws are expressly made part of the contract, and though plaintiff is expressly required thereby to exhaust such remedies before bringing suit, for the reason that in such case defendant is precluded from setting up the provisions of such by-laws as a defense to the action.

Josiah Cratty, Defendant in Error, v. William F. Buker, Plaintiff in Error.

Gen. No. 20,401. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915.

Statement of the Case.

Action by Josiah Cratty, plaintiff, against William F. Buker, defendant, to recover on a contract for professional services as an attorney at law. To reverse a judgment for plaintiff for \$343.40, defendant prosecutes this writ of error.

Plaintiff is an attorney at law, and was retained by the defendant to represent him in a certain litigation then pending in the Superior Court of Cook county. It was agreed that plaintiff should receive \$5 per hour for the time necessarily employed. January 26, 1912, a memorandum of the agreement was signed by the defendant, which stated that \$100 had been paid as

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cratty v. Buker, 195 Ill. App. 506.

a retainer, and that the fees earned should be "paid as fast as can be, and secured on Buker's Estate." In accordance with the agreement, plaintiff proceeded to represent the defendant in the case in the Superior Court, and continued to do so until some time in July, 1912. At that time plaintiff claimed he had been necessarily engaged 127½ hours in the litigation, and requested that the defendant secure him for his fees before proceeding further. At the time of the request the amount of his services rendered had not been computed. Plaintiff requested that he be secured on the interest which the defendant had in the property involved in the case in the Superior Court, the security to cover the services rendered and to be rendered. The defendant refused to do so, stating that as he did not know the amount of plaintiff's bill, he was unwilling to give the security. Thereupon plaintiff said he would have nothing further to do with the case.

THOMAS W. PRINDEVILLE, for plaintiff in error; JAY C. LYTLE, of counsel.

CHARLES HUDSON, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 183*—*when motion for peremptory instruction must be made.* A motion for a peremptory instruction made at the close of plaintiff's evidence and denied is waived unless renewed at the close of all the evidence.

2. APPEAL AND ERROR, § 1410*—*when verdict will not be set aside as against weight of evidence.* A verdict will not be set aside on review of the judgment unless it is manifestly against the weight of the evidence.

3. ATTORNEY AND CLIENT, § 135*—*sufficiency of evidence to sustain verdict for fees.* In an action to recover on a contract for professional services as attorney at law, a judgment for plaintiff held sustained by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bass v. Erie R. Co., 195 Ill. App. 508.

H. Bass, Defendant in Error, v. Erie Railroad Company, Plaintiff in Error.

Gen. No. 20,466. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 8, 1915.

Statement of the Case.

Action by H. Bass, plaintiff, against the Erie Railroad Company, defendant, to recover for goods lost in transportation. To reverse a judgment for plaintiff for \$400, defendant prosecutes this writ of error.

In 1911, plaintiff, who was a resident of Passaic, New Jersey, was moving to Chicago, Illinois. The evidence tended to show that the plaintiff took his household goods to the freight depot of the defendant, located in New Jersey, on September 4, 1911. That being Labor Day, no goods were being received. The plaintiff then took them and delivered them to an expressman, to be taken by the latter to the defendant the next day for shipment to Chicago. The defendant and his family left for Chicago on September 4th. The next day the expressman delivered the goods to the railroad company. He paid the freight, \$6, received a bill of lading, and mailed the same to the plaintiff in Chicago. The articles were household goods. One item was "11 case contents." All of the goods weighed eight hundred pounds. Stamped on the bill of lading in red ink by the agent in New Jersey was the following:

"For the purpose of enabling the carrier to apply the proper published rate, as explained in its Classification and Tariffs, I hereby declare that the value of the property herein described does not exceed \$10.00 per 100, and that in case of loss or damage thereto, I will not assert claim against the carrier on a higher basis of value than \$10.00 for each 100 pounds or frac-

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tion thereof in weight of the property so lost or damaged." (This was signed by plaintiff's agent.)

When the goods arrived in Chicago, plaintiff was notified and he received all of his property except one case of goods, which the plaintiff testified consisted of curtains, silk, embroidery, etc.

W. O. JOHNSON and BULL & JOHNSON, for plaintiff in error; ARTHUR S. LYTTON, of counsel.

BERNARD J. BROWN and IRA FOGEL, for defendant in error.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **COMMERCE, § 4***—*what constitutes interstate commerce.* In an action to recover for goods lost by a carrier in transportation from Passaic, New Jersey, to Chicago, Illinois, the refusal of the trial court to hold, as a proposition of law, that the transaction in question was interstate commerce, *held* erroneous.

2. **COMMERCE, § 5***—*exclusiveness of power of Congress to regulate interstate commerce.* By the Act of Congress of February 4, 1887, as amended, it was the intention of Congress to take possession of the whole subject of interstate commerce, and to supersede all state regulation with reference thereto, and such act applies to every detail of such commerce.

3. **CARRIERS, § 138***—*when schedules of rates filed with Interstate Commerce Commission admissible in evidence.* In an action to recover for goods lost by a carrier in interstate transportation, the exclusion of copies of the schedules of rates filed with the Interstate Commerce Commission *held* error, for the reason that such schedules are expressly made competent by section 18 of the Interstate Commerce Act.

4. **APPEAL AND ERROR, § 1173***—*when defense not presented to trial court not considered on appeal.* In an action without a jury to recover for goods lost in interstate transportation, defendant is precluded from relying in defense upon the fact that suit was not commenced within the time required by its schedules of rates when such defense was not made in the trial court, as such point cannot be made on review for the first time.

5. **CARRIERS, § 165***—*when provision in bill of lading limiting liability valid.* An agreement in a bill of lading for interstate trans-

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portation which limits the liability of the carrier in case of loss to \$10 per hundred weight of the goods transported under the bill of lading is valid.

**The People of the State of Illinois, Defendant in Error,
v. Western Electric Company, Plaintiff in Error.**

Gen. No. 20,736. (Not to be reported in full.)

Error to the County Court of Cook county; the Hon. JOHN E. OWENS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed. Opinion filed December 8, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois against the Western Electric Company, a corporation, defendant, by which defendant was charged with violation of Hurd's Rev. St., ch. 120, sec. 24 (J. & A. ¶ 9238) in that it failed, refused and neglected to make out and file a statement of its personal property as required by such statute. To reverse a judgment of conviction imposing a fine of one hundred and fifty dollars, defendant prosecutes this writ of error.

HOLT, CUTTING & SIDLEY, for plaintiff in error.

MACLAY HOYNE and HAYDEN N. BELL, for defendant in error; FRANCIS E. HINCKLEY and HENRY A. BERGER, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **TAXATION, § 188***—*when Act of 1898 construed as revising assessment procedure.* The Revenue Act of 1898 (J. & A. ¶ 9516-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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9576) provides for an entirely new system of assessment, with new modes of procedure and a new system of review, and as to that subject is practically complete in itself, constituting an entire plan for the making of assessments.

2. **STATUTES, § 148***—*when revision operates as repeal.* A subsequent statute which revises the whole subject of a former act and is intended as a substitute for it operates as a repeal of the former, although containing no express words of repeal.

3. **TAXATION, § 665***—*what effect of Act of 1898 on prior acts.* The provision of Hurd's Rev. St., ch. 120, sec. 24 (J. & A. § 9238), that one failing to file a schedule of his personal property for taxation as therein required shall be guilty of a misdemeanor, is repealed by section 19 of the Act of 1898 (J. & A. § 9534), providing that in such case the assessor shall list the property at its fair cash value and shall add to such list an amount equal to fifty per cent. of its valuation.

Ernst E. Lehmann, Appellant, v. Wesley Shimeall and John W. Dorgan, Appellees.

Gen. No. 20,871. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 8, 1915. Rehearing denied December 21, 1915.

Statement of the Case.

Bill by Ernst R. Lehmann, complainant, against Wesley Shimeall and John W. Dorgan, defendants, in the Circuit Court of Cook county, praying relief against notes alleged to be usurious. From a decree dissolving a preliminary injunction and dismissing the bill for want of equity, complainant appeals.

FRANCIS W. WALKER and CHARLES E. SELLECK, for appellant.

JONAS O. HOOVER, for appellees.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lehmann v. Shimeall et al., 195 Ill. App. 511.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 16***—*when right of appeal from order does not exist.* Since the right to appeal is entirely statutory, no appeal lies from an order dissolving an injunction under section 123 of the Practice Act (J. & A. § 8661), providing for appeals from interlocutory decrees granting an injunction, overruling a motion to dissolve, and enlarging the scope of such injunction.

2. **APPEAL AND ERROR, § 270***—*when order not final so as not to authorize appeal.* An order dissolving a preliminary injunction is interlocutory and not final, and therefore no appeal will lie from such order.

3. **APPEAL AND ERROR, § 1853***—*when appeal bond sufficient in form.* An appeal from a decree dismissing a bill is properly before the Appellate Court although the appeal bond recites that "Ernst" E. Lehmann is principal, while in the condition of the bond appellant's name is given as "Ernest" E. Lehmann, "Ernst" and "Ernest" being *idem sonans*.

4. **USURY, § 45***—*when bill sufficiently alleges usury.* An allegation in a bill alleging that the notes against which relief is sought were given for double the amount of the loan alleges that the notes were usurious.

5. **USURY, § 64***—*when relief will be granted from a usurious transaction.* The question whether a loan is usurious is a question of fact, and in determining the question equity will look at the substance of the transaction, disregarding the color or form given it by the parties, and will not permit parties to evade the statute by any conceivable scheme or expedient, for which reason, if in any form or shape the transaction appears to be usurious, it will be so declared, and the proper remedy applied.

6. **USURY, § 65***—*when relief granted in equity.* In equity a complainant praying for affirmative relief against a usurious contract must pay the amount of the loan with legal interest, although at law the whole of such interest is in such case forfeited.

7. **EQUITY, § 52***—*when remedy at law inadequate so as to give equity jurisdiction.* Although in an action at law between the original parties to a note, want of consideration is such a defense to the note as to make the remedy at law adequate, yet a bill alleging that at the time when the bill was filed such notes were not yet

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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due, and that the holder had threatened and was about to dispose of some of the notes against which relief is sought, states a case where such remedy is inadequate save in a court of equity, for the reason that the defense of want of consideration as between the parties cannot be set up in an action where plaintiff is a bona fide holder.

8. **TENDER, § 20***—*when bill offering to pay into court amount found due sufficient tender.* An averment in a bill seeking relief against notes alleged to be usurious, which alleges that complainant is ready and willing and offers to pay whatever amount the court may find to be due, is a sufficient tender of such amount to enable complainant to maintain his bill.

9. **EQUITY, § 263***—*when supplemental bill will not aid original bill.* Where a bill fails to state grounds for relief the defect cannot be cured by a supplemental bill, for the reason that the office of a supplemental bill is to bring before the court matters which have taken place since the bill was filed.

10. **INJUNCTION, § 13***—*when preliminary injunction will issue to prevent disposal of usurious notes.* A bill praying relief against usurious notes which alleged that such notes were not yet due and that defendant threatened and at the time the bill was filed was about to dispose of some of the notes, and in which a sufficient tender was made to pay the amount legally due on the notes against which relief is sought, *held* to entitle complainant to a preliminary injunction.

11. **EQUITY, § 344***—*when bill should not be dismissed for want of equity.* Where a bill, with its amendments and a supplemental bill, stated grounds for relief and also entitled complainant to a preliminary injunction, a decree dissolving such injunction and dismissing the bill for want of equity *held* erroneous.

**First National Bank of Hayward, Wisconsin, Appellee,
v. W. E. Gerry and A. R. Krum, Appellants.**

Gen. No. 20,971.

1. **CONTINUANCE, § 7***—*when ground alleged insufficient.* In an action on a promissory note, the copy of the instrument attached to plaintiff's pleadings showed an indorsement as stricken out. Defendant's plea alleged, *inter alia*, that the indorser in question was the owner of the note and plaintiff was merely the agent and trustee of defendant. The note, when offered in evidence, showed that the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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indorsement had not been stricken out. Defendant moved for a continuance on the ground of surprise, which motion was overruled. *Held*, that the denial of the motion was not error.

2. PLEADING, § 253*—*when amendment after verdict properly allowed*. In an action on a promissory note, where a copy of the note attached to plaintiff's pleadings showed an indorsement as having been stricken out, and there was no averment of an indorsement, but the note when offered in evidence showed no indorsement stricken out as shown by such copy, whereupon defendant objected to the admission of the note on the ground of variance, an amendment showing that the note had been indorsed, delivered and protested, *held* properly allowed after verdict.

3. APPEAL AND ERROR, § 550*—*when objection limited to specific grounds*. The statement of one or more specific grounds of objection to evidence is a waiver of all other such grounds, for the reason that such an objection is limited to the grounds specified and excludes others not specified.

4. APPEAL AND ERROR, § 508*—*when objection to admission of evidence properly overruled*. It is not error to overrule an objection to evidence made on several grounds where one of the grounds specified is untenable, for the reason that the court is not bound to separate that part of an objection which is tenable from that which is untenable.

5. EVIDENCE, § 138*—*when notice to produce notice not essential*. The contents of a notice served by one party upon another may be proved without first giving notice to produce the original, especially where the evidence shows that the giving of such notice to produce would be useless.

6. BILLS AND NOTES, § 289*—*when evidence of service of notice of protest by mail sufficient*. In an action against an indorser of a promissory note, an objection to evidence of notice of protest sent to defendant *held* properly overruled, although no demand was first made on defendant to produce the original and although there was evidence that defendant did not receive the notice, where it further appeared that the notice offered in evidence was sent by mail addressed to defendant at a place where he had been in business for ten years prior to the commencement of the action.

7. PLEADING, § 152*—*when affidavit of merits necessary*. In an action against the maker and one indorser of a promissory note where defendants make joint pleas and file a sufficient affidavit of merits therewith, but where such indorser alone files a further plea without filing an affidavit of merits therewith, an order striking such separate plea *held* not erroneous where the affidavit filed with the joint pleas does not specify the nature of the defense set up by the special plea.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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as in such case there is no compliance with the requirement of Hurd's Rev. St., ch. 110, sec. 55 (J. & A. ¶ 8592), requiring that the affidavit of merits shall specify the nature of the defense.

8. APPEAL AND ERROR, § 384*—*when objection to curable defect waived.* An objection to an order striking a separate plea filed by a defendant on the ground that plaintiff's affidavit of claim is defective is unavailable on review, where at the time the order was entered striking such plea the attention of the trial court was not directed to such alleged defect in the affidavit, especially where such defect could have been readily cured if seasonably objected to.

9. TRIAL, § 194*—*when direction of verdict proper where different verdict would be set aside.* It is not error to refuse a peremptory instruction in favor of both defendants in an action against the maker and one indorser of a promissory note where one defendant has no defense to the action.

10. PLEADING, § 28*—*when competency of evidence not affected by failure to set out in declaration.* In an action on a promissory note where plaintiff is indorsee for value, the draft with which plaintiff purchased the note sued on is competent, although not set out in the declaration.

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915. *Certiorari* denied by Supreme Court (making opinion final).

LYMAN M. PAINE, for appellants.

HUGH O'NEILL, for appellee.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is an appeal from a judgment rendered on a promissory note in favor of appellee, hereinafter called the plaintiff, and against appellants, hereinafter called the defendants. The note was for \$4,000, dated December 10, 1911, and payable one year after date to the order of the Western Casket & Undertaking Company, at 5 East Randolph street, Chicago, with interest at six per cent. The defendant Gerry was the maker of the note, and before its delivery to the payee, it was indorsed by the defendant Krum. Following this,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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it was also indorsed by the payee and by the Western Casket Company. Plaintiff purchased the note from the Hibernian Banking Association November 1, 1911, paying the face value and accrued interest therefor. The declaration consisted of one special count and the common counts. The special count, in the usual form, alleged that after the note was made it was indorsed by the defendant Krum and delivered to the Western Casket & Undertaking Company, and thereafter delivered to the Hibernian Banking Association, and then to the plaintiff. There was no averment that the Casket Company had indorsed the note. Said count further averred that the note, when it became due, was presented to the two defendants at 5 East Randolph street for payment; that payment was refused. Attached to the declaration was a copy of the note, on which the indorsements of the Western Casket & Undertaking Company and the Western Casket Company were stricken out in red ink. There was an affidavit of claim attached to the declaration. Both defendants filed the general issue and three special pleas. The first special plea averred that the plaintiff was not a bona fide holder, having taken the note with notice and knowledge that there was no consideration. The second was substantially the same, but averred in addition that the note was owned by the Western Casket & Undertaking Company, and held by the plaintiff merely as agent and trustee. The third was substantially the same as the first, and in addition averred that the note was only accommodation paper, and that the Western Casket & Undertaking Company had paid it. The fifth plea, a separate one on behalf of Krum, averred that no notice of dishonor of payment had been given to him, and further that the note had not been presented for payment to him. Attached to these pleas was an affidavit of merits by Gerry, stating that the defendants had a good defense upon the merits to the whole of the demand; that the nature

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of the defense was that there was no consideration; that the note was an accommodation one; and that the plaintiff was not a bona fide holder, but merely an agent of the payee. This was dated January 13, 1912. Issue was joined on all of the pleas except the special plea of Krum, which, on February 1, 1913, was stricken from the files for failure to file an affidavit of merits, as required by section 55, ch. 110, Rev. St. (J. & A. ¶ 8592), to which order defendant Krum excepted.

On April 13, 1914, the case came on for trial before a judge and a jury. The note was offered in evidence, and it appeared that none of the indorsements had been stricken out, as shown by the copy attached to the declaration. Counsel for the defendants objected on the ground that there was a variance between the said copy and the note offered, and also between the allegations of the declaration and the note. The objection was overruled. The defendants then moved for a continuance on the ground of surprise, which the court overruled. After verdict, the court permitted an amendment to the declaration showing that the note had been indorsed, delivered and protested. The defendants excepted. They now argue that the court committed error in not granting a continuance. In this contention we cannot concur, for it is apparent that under the pleas on file by the defendants, they could not have been surprised by the amendment allowed by the law. Our statutes permitting amendments are very liberal, the purpose being that cases should be decided on their merits. Section 1, ch. 7, (J. & A. ¶ 300) and section 39, ch. 110, Rev. St. (J. & A. ¶ 8576). We hold that the court committed no error in allowing the amendment.

On the trial, the plaintiff offered a notice of protest by a notary public, which stated that the notary, at the request of the Continental & Commercial National Bank, went with the original instrument, a copy of which was attached to the protest, to the office of

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Gerry, at 5 East Randolph street, and demanded payment; that Gerry was not there, and no instructions were left with anyone to pay the note. The protest further recites the mailing of notices to all of the parties, including the defendants Gerry and Krum, Krum's being mailed in care of the First National Bank. Mr. Rohlf, the president of the plaintiff bank, testified that he had received the protest above mentioned from the Continental & Commercial National Bank of Chicago. When this notice of protest was offered, the defendants objected "because it does not describe the note in controversy, and does not describe the residences of defendants nor their usual places of business. I also object because it is irrelevant, incompetent and immaterial and because it is not set up in the declaration and does not tend to prove any of the issues in the case."

In this court, counsel argues that the statute making it the duty of notaries to protest negotiable instruments was repealed in 1907; that the law does not authorize a notary to serve a notice of dishonor any differently than if the same were served by any other person; and that the notary's certificate of protest is not evidence of that fact in relation to inland bills.

It clearly appears from the objections above quoted that none of the objections which he now urges was called to the attention of the trial judge. It is a rule of universal application that an objection is limited to the grounds specified, and does not cover others not specified. *Millers' Nat. Ins. Co. v. Jackson County Milling Co.*, 60 Ill. App. 224; *Hess v. Ferris*, 57 Ill. App. 37. The statement of one or more specific grounds of objection to the introduction of evidence is a waiver of all other grounds of objection. *Ewen v. Wilbor*, 208 Ill. 492; *Garrick v. Chamberlain*, 97 Ill. 620. In the *Ewen* case, *supra*, the court said (p. 502):

"The note had been protested, and when it was offered the plaintiff also offered the notary's certificate

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of protest. When this was offered appellant's counsel said: 'I object to the protest. The suit is not against Warren Ewen, the maker of the note, but it is against the guarantor, and the protest is not competent evidence.' The protest was attached to the note and the note was offered in evidence without objection. It is now sought to raise the question that the protest could only be proved by a certified copy of the record required by the statute to be kept by notaries in such matters. That is not the question that was presented to the trial court. The distinction between the objection to evidence because of its competency and because of its sufficiency is well defined. Had the objection now insisted upon been urged at the trial, appellee could doubtless have had the notary make the certificate it is now said was necessary. (*Herrick v. Baldwin*, 17 Minn. 209), and to allow appellant to urge one objection upon the trial and another in this court would be to place appellee at an unfair advantage. The objection that the certificate of protest related to matter between other parties than those to the suit, and therefore incompetent, which was the one urged, is not within the contention that the certificate was insufficient. Appellant having urged the single and specific objection, thereby waived all other objections. *Garrick v. Chamberlain*, 97 Ill. 620; *Walcott v. Gibbs*, id. 118; *Newell v. Woolfolk*, 91 Hun 211; *Lallman v. Hovey*, 92 id. 419."

In the case of *Coffen Coal & Copper Co. v. Barry*, 56 Ill. App. 587, a general objection was made to the introduction of evidence, the precise point not being called to the attention of the court. Mr. Justice Boggs, in delivering the opinion of the court, said (p. 590):

"Had proper objection been made so that the court and counsel could have known the ground thereof, no doubt such action would have been taken as to have removed all just cause of complaint. It is not permissible to so frame an objection that it will serve to save an exception for the action of a court of review and yet conceal the real complaint from the trial court."

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As has been stated, several objections were urged to the introduction of the document, one being that it did not describe the note. This objection was clearly erroneous, as the note, with all indorsements, was set out in full.

“If an objection is double, and one of the grounds assigned is untenable, error cannot be assigned to the overruling of the objection. No duty rests on the court to separate that part of the objection which is tenable from that which is not.” 38 Cyc. 1390; *Campbell v. Hughes*, 155 Ala. 591.

If the objections now urged had been made on the trial, they could have been readily obviated by calling the notary. The defendants having specified the grounds of their objection, cannot now be heard to urge other and different grounds.

Similar evidence was held competent in the case of *Commonwealth v. King*, 150 Mass. 221. That was an indictment against King for running a steamboat without a license. To prove the location of the place in question, a map of the State of Massachusetts was introduced in evidence, over the objection of the defendant. The court said:

“If this was a map of the towns and counties of the Commonwealth published by authority of the Legislature, * * * it was some evidence. * * * The objection taken in argument is that the map was allowed to prove itself, and that it was not shown to have been published by legislative authority. Whether this was a genuine map * * * as it purported to be, was a preliminary fact, of which, if disputed, some evidence must have been exhibited to the court before the map could be admitted in evidence; but it does not appear that this fact was disputed, or that the objection to the admission of the map was taken on this ground. If such an objection had been taken, the government might, perhaps, have been able to furnish evidence that the map was what it purported to be.” See, also, 2 Jones on Evidence (Horwitz Ed.) sec. 297, and 5 Jones on Evidence (Horwitz Ed.) sec. 893.

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Counsel also complains of the admission of a notice sent by the plaintiff to the defendant Krum, advising him that the note had not been paid. The witness testified that he had received through the mail from the Continental & Commercial National Bank, inclosed with the notice of protest above mentioned, three copies of the same, and that he mailed one of them to the defendant Krum, 217 South Western Avenue, Chicago, Illinois. It was objected that this was not the best evidence. The objection was overruled, and the witness testified that he sent this notice of protest to the defendant Krum. Defendant complains that as no notice had been served on him to produce the original, secondary evidence was not admissible. Defendant Krum testified that he never received the notice, so it is apparent that if the case were reversed on this ground, the serving of the notice would be a useless thing. Furthermore, a party may prove the contents of a notice served upon the opposite party without first giving notice to produce the original. *Brown v. Booth*, 66 Ill. 419; *Prairie State Loan & Building Ass'n v. Gorrie*, 64 Ill. App. 325; *Eagle Bank v. Chapin*, 3 Pick. (Mass.) 180. In the *Chapin* case, *supra*, it was held that the contents of a written notice to an indorser of a promissory note may be proved by parole, without first giving notice to produce such writing. Defendant Krum further contends that his address is 215 South Western avenue, while the notice was mailed to 217 South Western avenue. A witness testified on behalf of the plaintiff that he had examined the records in the map department of the city hall of Chicago, and that the place of business of Krum was known as 215-217 South Western avenue. The defendant Krum, on cross-examination, testified that he had been in business at 215 South Western avenue for nearly ten years, as president and treasurer of a factory. He described the building and surroundings, and under the facts we have no doubt that the mail-

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ing of the notice to the address as stated was sufficient.

Defendant Krum also contends that the court erred in striking his separate plea from the files: First, because it was in compliance with section 55 of the Practice Act (J. & A. ¶ 8592); and second, no affidavit was required for the reason that the affidavit of plaintiff's claim purported to be made before a notary public in Wisconsin, and that the court will not presume that such a notary has authority to administer oaths, in the absence of a certificate by said notary, or some showing to that effect. If an affidavit of merits was required, the one filed was not in compliance with section 55, *supra*. The plea averred that no notice of dishonor by nonpayment of the note was given to him, and that the note was never presented for payment. The affidavit stated that the note was given without consideration, and that the plaintiff was not a bona fide holder. The statute requires that the affidavit shall specify the nature of the defense. This the defendants did, as to all pleas, except the separate plea of Krum. The affidavit was clearly insufficient.

When the defendants filed the affidavit of merits, which was good except as to the last plea, they did so on the theory that the affidavit of plaintiff's claim was sufficient, and when the court struck the special plea filed by defendant Krum from the record, no point was made that the affidavit attached to plaintiff's claim was made before a foreign notary. If such complaint had been made, it could have been readily cured. The order striking the plea from the files was made February 1, 1913. The case was not called for trial for more than a year afterwards. At no time was the court's attention called to any insufficiency in the affidavit attached to plaintiff's claim. It appears to have been first raised in this court. Where a party takes a position in the trial court, he cannot, after being defeated, shift his position in a court of review. Especially is this true where the defect could have

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been easily cured. Courts of review are instituted for the purpose of correcting errors committed by the trial courts, and as the point was not called to the court's attention, it cannot now be made. The defendant Gerry testified that he signed the note, as did likewise the defendant Krum, and it was practically conceded on the oral argument that Gerry had no defense. No testimony was offered to sustain the second, third and fourth pleas, which averred that there was no consideration; that the plaintiff was not a bona fide holder, and that the note had been paid.

Complaint is made as to the giving of certain instructions at the instance of the plaintiff, and also the refusal of the court to give a peremptory instruction for both defendants. Counsel concedes that the record shows no defense as to Gerry. Manifestly, there was no error in refusing the peremptory instruction, as under the evidence no verdict could stand, except one for the plaintiff. It is unnecessary to discuss this contention further.

Counsel objects to the introduction of the draft in evidence, because it was not declared on in the declaration. This suit was on a note. The defendants' plea averred that no consideration was given. Plaintiff introduced the draft with which he purchased the note. It is elementary that the evidence need not be set out in the declaration.

We have carefully considered all the other reasons assigned as error, and hold them to be without merit.

There being no substantial error in the record, the judgment of the Circuit Court will be affirmed.

Affirmed.

Delaney v. McNeil & Higgins Co. et al., 195 Ill. App. 524.

May C. Delaney, Appellant, v. McNeil & Higgins Company and Charles I. Ross, Trustee, Appellees.

Gen. No. 20,980. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by May C. Delaney, complainant, against McNeil & Higgins Company, a corporation, and Charles I. Ross, trustee, defendants, in the Superior Court of Cook county, praying an accounting. From a decree dismissing the bill for want of equity and granting the prayer of the cross-bill, complainant appeals.

The facts are these: May C. Delaney, the complainant, on March 3, 1911, acquired a grocery and market from her brother-in-law, Patrick J. Delaney, a brother of her husband. The complainant's husband, George M. Delaney, had been conducting a store for a number of years prior to March 3, 1911, and purchased supplies from McNeil & Higgins Company, one of the defendants. He had been in ill health, and in order to convey his property and business to his wife, without going through the Probate Court, he transferred them to his brother, Patrick J. Delaney, and on the same day, March 3, 1911, Patrick J. Delaney transferred, through proper instruments of conveyance, all the property to the complainant. At the time of the transfer, George M. Delaney was indebted to the defendant in the sum of \$2,187.39. A few days after the transfer, complainant began to conduct the business, and on March 9, 1911, began purchasing merchandise from the defendant, and continued so to do regularly until January, 1913. About March 9, 1911, a representative of the defendant called up the complainant on the telephone at her place of business,

and inquired if she had taken over her husband's business. He testified that the person answering the telephone stated that she was Mrs. Delaney, and that she had taken over her husband's property and business. (Her husband died June 11, 1911.) She then promised to pay the balance due from her husband to the defendant, not all at once, but some every month, and that she would send a check in a short time. Complainant testified that she never talked with the witness over the telephone about this matter. The witness did not recognize the voice, but afterwards, having met the complainant several times, he testified that it was the complainant with whom he talked on the telephone. A few days afterwards, complainant sent defendant a check for \$500 on account. At that time she had purchased but \$200 worth of merchandise from the defendant. The account was carried on the books of the defendant all the time in the name of complainant's husband, and every month statements were sent to her showing the balance due, and in each statement was included the balance due from her husband. The defendant had been pressing for payment from time to time, and on January 15, 1913, complainant went to defendant's place of business, and executed a note for \$3,577, due ninety days after date, with interest at seven per cent., and secured the same by a trust deed on the real estate in question. This amount was the balance due at that date for all goods purchased by complainant or her husband from the defendant. At that time there was a balance due on account of the goods purchased by the complainant from the time she conducted the business, in excess of what she had paid, of \$1,347.54. Complainant contends that she at no time promised to pay the debt of her husband, and that she did not know she was signing a trust deed and note, but thought it was a schedule of her assets; that the note and trust deed were obtained from her by means of fraud and deceit.

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On October 23, 1913, she filed her bill of complaint in the Superior Court against the defendant. The bill prayed for an accounting, alleging that she had tendered the balance due defendant, \$1,347.54, which was refused, and asking that the note and deed be delivered up and canceled. The defendant answered, denying fraud and deceit, and averring that all matters were fully explained to and understood by the complainant. On January 15, 1913, the defendant filed a cross-bill, asking that the mortgage be foreclosed.

The original bill came on for hearing before the chancellor, who found that the charge of fraud and deceit had not been sustained; that the equities were with the defendant, and decreed that unless the amount due the defendant on the note was paid within twenty days, the defendant would be entitled to proceed with the hearing on its cross-bill. The payment not having been made, evidence was heard in open court on the cross-bill and answer.

GEORGE V. McINTYRE, for appellant.

MATHER & HUTSON, for appellees; WILLIAM A. SHEEHAN, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 173*—*when telephone conversations admissible.* Telephone conversations held between a witness and one who answers the telephone in another's place of business are competent although the voice of the person speaking cannot be recognized by the witness, for the reason that one who places himself in connection with the telephone system through an instrument installed in his place of business invites communication with him through that channel in regard to his business, such conversations being competent on the same ground as interviews between a customer and an unknown clerk in charge of a shop in regard to the business carried on there.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. **FRAUDS, STATUTE OF, § 2***—*when Statute of Frauds not applicable to instrument in writing.* Where the instrument sought to be enforced is in writing the Statute of Frauds has no application, though such instrument may have been given in pursuance of an oral agreement to pay the debt of another.

3. **FRAUD, § 115***—*when evidence insufficient to establish fraud.* In a bill seeking relief against a note and trust deed on the ground of fraud, a finding that there was no fraud *held* sustained by the evidence.

4. **APPEAL AND ERROR, § 1395***—*when findings of chancellor will not be disturbed.* Where a bill seeks relief against a note and trust deed on the ground of fraud and the evidence as to fraud is conflicting, the finding of the chancellor, after seeing and hearing the witnesses, that the allegation of fraud was not sustained by the evidence will not be set aside by a court of review unless manifestly against the weight of the evidence.

5. **FRAUD, § 112***—*sufficiency of evidence to establish fraud.* Where fraud is relied on it must be proved by clear and convincing evidence.

6. **FRAUD, § 87***—*not presumed.* Fraud is never presumed.

7. **CANCELLATION OF INSTRUMENTS, § 37***—*when trust deed will not be canceled, but enforced on cross-bill.* Where a bill sought cancellation of a note and trust deed and where a cross-bill prayed the enforcement of the trust deed, a decree that unless complainant within twenty days paid the amount of the note secured by the trust deed sought to be enforced defendant might go to hearing on its cross-bill, *held* not inequitable although the debt for which such note was given was in part the debt of another, it appearing that complainant had received a gift of such other person's business, which she thereafter carried on for her own benefit, and it also appearing that in consideration of executing the note complainant had been given further time in which to make payment, and that further credit had also been extended to her in consideration thereof.

William K. Pattison, Administrator, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 21,017. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915. *Certiorari* denied by Supreme Court (making opinion final).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Pattison v. Chicago City Ry. Co., 195 Ill. App. 527.

Statement of the Case.

Action by William K. Pattison, as administrator of the estate of Andrew Ziehler, deceased, plaintiff, against the Chicago City Railway Company, defendant, in the Superior Court of Cook county, to recover for the death of plaintiff's intestate. From a judgment for plaintiff for \$6,000, defendant appeals.

The facts are as follows: On December 9, 1908, the defendant owned and operated street cars on State street, Chicago. State street extends north and south, and is intersected at right angles by 13th and 14th streets. The distance between these two last mentioned streets is about six hundred feet. On the east side of State street, and about the middle of the distance, was a large barn of the Dixon Transfer Company. There were two entrances to the barn from State street. The company was engaged in the teaming business, and had about two hundred wagons and teams. In front of the entrance to the barn on the east side of the street was an electric arc light. This entrance was about three hundred feet from 13th street and the same distance from 14th street. There was a similar light almost immediately west on the west side of State street. It was the custom of the Dixon Company to have a watchman or flagman, in the evening, in front of the barn entrance and near the street car tracks, to signal the motormen and the drivers of the teams, so as to prevent collisions. The flagman usually had a lighted lantern in his hand, but there was some evidence that the signals were sometimes given by the flagman waving his hand only. This custom was known to the drivers of the teams and to the street car men operating cars on State street, and had been in effect for a considerable period of time. During that season of the year, shortly before the holidays, teams would come into the barn from the day's work until after ten o'clock at night. On

the day in question, plaintiff's intestate, Ziehler, together with two other teamsters of the Dixon Company, were hauling for Butler Brothers, located near Canal and Randolph streets. Each of the three had a team and wagon. Two of the wagons were loaded at Butler Brothers, and the three started, about nine o'clock, for the barn, driving south on State street. As they reached about 13th street, plaintiff's intestate was in the lead, but at this point one of the other drivers, who did not have any load, drove ahead of him. They were all on the west side of the street. When the driver without a load was about opposite the barn, he was signaled by the flagman to drive to the barn, which he did. Plaintiff's intestate and the other driver waited on the west side of the street for their signal. The first team had gone into the barn, when the flagman signaled plaintiff's intestate to come to the barn, and at the same time signaled the motorman, who was coming north on the east track, to stop the car. The night was bright and a street car or team could be seen for about two blocks. As plaintiff's intestate drove east across the tracks, the car struck the rear wheel, throwing the wagon around to the north, and the plaintiff's intestate was thrown off on the pavement. The car ran some distance beyond the wagon and came to a stop. The injured man was placed on the platform of another car coming from the south and was taken to a hospital, where he died ten days later as a result of the injury.

There was considerable dispute as to the location of the car and the wagon at the time the signal was given by the flagman, some stating the car was near 14th street, which would be about three hundred feet south of where the flagman stood, and others placing it at a distance further north. There was also some conflict as to whether the flagman had a lantern in his hand, but there is no dispute that if he did have such a lantern, it was not lighted, it having acci-

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dentally gone out, and that the signal was either given by his hand or by swinging the unlighted lantern. The motorman testified that he saw the signal, but thought it was someone who wanted to board the car as a passenger, and he paid no attention to the signal. The flagman had to jump off the track to escape being struck with the car, as he testified no effort was made to stop it. The motorman testified that the team driven by plaintiff's intestate came from behind a southbound car on the west track, and that he did not see the team until it was too late. Other witnesses testified that there was no other car in the vicinity, but that a car had proceeded south some time before. The deceased was a man thirty-seven years of age, weighed about 225 pounds, and was strong and healthy.

The court refused an instruction requested by defendant which told the jury that the defendant had a superior right of way over persons and wagons in the portion of the street occupied by its tracks, except at street intersections, having due regard to the rights and safety of persons in the street; that it was the duty of persons driving teams to recognize this right, "and when crossing the tracks, to do so in a manner not to obstruct or delay the same," and that if the jury believed from the evidence that the deceased, at the time in question, failed to recognize such superior right of way, "but, on the contrary, negligently attempted to cross the tracks, in front of the street car, without due regard to its superior right of way, and thereby caused or proximately contributed to cause the collision, then the plaintiff cannot recover in this case."

FRANK L. KRIETE and WATSON J. FERRY, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

PATTISON & SHAW and GORMAN, POLLOCK, SULLIVAN & LIVINGSTON, for appellee.

Schmidt v. Cooper, 195 Ill. App. 531.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Abstract of the Decision.

1. **NEGLIGENCE, § 191***—*whether contributory negligence question for jury or court.* Although as a general proposition the question of contributory negligence is one of fact for the jury, yet where the inference of negligence necessarily results from the evidence the question becomes one of law for the court.

2. **STREET RAILROADS, § 135***—*when contributory negligence question for jury.* In an action to recover for the death of plaintiff's intestate as a result of a collision between the team driven by deceased and an electric car alleged to have been negligently operated by defendant's motorman, the question whether deceased was guilty of contributory negligence *held* properly submitted to the jury under the evidence.

3. **STREET RAILROADS, § 141***—*when instruction on negligence properly refused as too broad.* In an action to recover for the death of plaintiff's intestate as a result of a collision between the wagon deceased was driving and an electric car alleged to have been negligently operated by defendant's motorman, *held* not error to refuse an instruction which, in effect, told the jury that the car had the superior right of way; and deceased's failure to recognize such right of way by crossing in front of the car would preclude recovery if such failure caused or proximately contributed to the injury, for the reason that as framed the instruction was too broad, implying that such conduct of deceased was to be deemed negligence, whereas such instruction should have been so framed as to tell the jury that in case deceased failed to use due care not to obstruct or delay the car, plaintiff could not recover.

**George Schmidt, Appellee, v. Paul W. Cooper
(Impleaded), Appellant.**

**In the Matter of the Appeal of Paul W. Cooper.
Gen. No. 21,749.**

1. **DEPOSITIONS, § 2***—*when master taking proof acts as examiner.* A person holding the office of master in chancery who is appointed by order of a court to take evidence in a proceeding, acts under

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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such order merely as a commissioner or examiner under Hurd's Rev. St., ch. 51, sec. 24 (J. & A. ¶ 5541), providing for taking depositions in a chancery suit, and does not act thereunder as a master in chancery under Hurd's Rev. St., ch. 90 (J. & A. ¶¶ 7364-7376), for which reason it is immaterial that at the time such order was entered issues had not been joined, nor any order of reference made.

2. DEPOSITIONS, § 2*—*when order of court not necessary.* Under Hurd's Rev. St., ch. 51, sec. 24' (J. & A. ¶ 5541), the complainant in a bill is authorized to take depositions to substantiate its averments before issues are joined, and without an order of court adjudging a necessity for so doing, and depositions so taken are in the nature of depositions *de bene esse*.

3. WITNESSES, § 200*—*when witness compelled to testify before commissioner.* A complainant may, on filing his bill, compel a witness to testify before a commissioner appointed by the court under Hurd's Rev. St., ch. 51, sec. 24 (J. & A. ¶ 5541), without an order of necessity or any showing of necessity other than that contained in the averments of the bill.

4. DEPOSITIONS, § 9*—*when scope of examination confined to averments of bill.* In taking the deposition of a witness in a chancery cause under an order of court entered in pursuance of Hurd's Rev. St., ch. 51, sec. 24 (J. & A. ¶ 5541), the examination of the witness must be confined to the averments of the bill, where such deposition is taken before issues are joined.

5. WITNESSES, § 202*—*when court of chancery has power to punish.* A court of chancery has inherent power to punish as for contempt any witness who refuses to obey an order of court.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915.

BRUNDAGE, LANDON & HOLT, for appellant; ROBERT N. HOLT, of counsel.

HELMER, MOULTON, WHITMAN & WHITMAN, for appellee; LLOYD C. WHITMAN and ROLAND D. WHITMAN, of counsel.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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This is an appeal by Paul W. Cooper from an order entered April 30, 1915, adjudging him guilty of contempt of court for failing to be sworn and give testimony before a master in chancery, acting as a commissioner in taking depositions, as provided in section 24, ch. 51, Rev. St. (J. & A. ¶ 5541), and committing him to the county jail until he should comply with the order of the court.

The facts are these: March 27, 1915, George Schmidt, appellee, filed a bill of complaint against Paul W. Cooper, *et al.*, touching the question of the ownership of fifty shares of the capital stock of the Riverview Park Company, a corporation, and praying, in substance, that the defendants be restrained *pendente lite* from selling, transferring or incumbering twenty-five of such shares, and that the pretended sale and assignment of said fifty shares, in so far as it affected twenty-five shares of such stock, be held to be null and void, and that upon a final hearing, the injunction be made perpetual, and for general relief. Upon the filing of the bill, summons was issued returnable to the May term of the Circuit Court. Cooper was served March 29, 1915. March 31, 1915, Schmidt caused written notice to be served on all of the defendants that on April 7, 1915, he would proceed before Roswell B. Mason, a master in chancery of the Circuit Court, to take the depositions of said Cooper and other witnesses. Proof of the service of said notice was made to the master on the same date, and he thereupon issued a subpoena in the usual form to said Cooper, commanding him to appear before the master at ten o'clock a. m. on April 7, 1915. At the time mentioned, Schmidt and his counsel appeared before the master. Cooper did not appear, whereupon, at the request of Schmidt, the master certified the facts to the court together with all documents. The parties appeared before the court and Schmidt presented the record of the proceedings before the master, and asked

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for an order requiring Cooper to appear before the master and give testimony, and that clerk of the court issue a subpoena on Cooper. After delays and after argument of counsel, representing both parties, the court, on April 21, 1915, entered an order finding the facts as shown by the record made by the master, and ordered that Cooper appear before the master on April 26, 1915, at ten o'clock a. m., and that he be sworn and testify on behalf of the complainant; that the clerk of the court issue a subpoena commanding Cooper to so appear. A certified copy of this order and the subpoena of the clerk were served personally on Cooper the same day.

April 26, 1915, the matter came on for hearing before the master. Cooper did not appear, but was represented by his solicitor, who stated Cooper's position to be that the summons in the case was returnable to the May term; that some of the defendants had entered their appearance and filed demurrers which were undisposed of, although the defendants were willing to proceed with the argument before the court; that the proceeding then before the master was brought under the statute which provides that a party may, when necessary, take certain depositions before the issues are formed in a case; that there was no power under the statute, as he construed it, which authorized the court to compel a witness to appear and give testimony, but that the same could be done only by consent, and not by compulsion; that the case, as yet, had not been referred to the master, and under the law this could not be done until the issues were formed; that no evidence could be taken until issues were formed; that the only way Cooper could test his rights in the premises was to refuse to obey the order of court, and refuse to appear and testify; that Cooper had the greatest respect for the master and for the court, but for the reasons above mentioned, he would not appear. The master certified the pro-

ceedings to the court, showing, among other things, Cooper's position as stated by his counsel.

On April 27, 1915, the matter came on for hearing before the court, and an order was entered finding, among other things, the proceedings which had taken place before the master, and it was ordered that Cooper show cause, by April 30th, why he should not be attached for contempt of court for failure to appear before the master on April 26, 1915, as ordered by the court.

Cooper filed an answer which was supported by an affidavit of his counsel. They both set up Cooper's position, which was substantially the same as that taken by him before the master, as above set forth, and an additional objection was made that as the issues were not formed, it could not be known what evidence would be competent, and therefore he could not make proper objections so as to prevent a prying into his personal affairs, which would thereby be disclosed to persons who were extremely hostile to him, and that he could not be compelled to testify, as there was no law, statutory or common, which authorized such procedure.

Cooper also personally appeared in court at the time of the filing of his answer. Thereupon the court heard the matter and entered an order on the same date, and found all of the facts that had theretofore taken place before the court and the master, adjudged Cooper guilty of contempt of court, and ordered that he be committed. From this order, the present appeal is taken.

It is conceded that if the court had the power to enter the order in question, that all the proceedings taken before the master and the court were regular. No point is made that the bill does not state a cause of action. The question, therefore, that is squarely presented, is, can the court, under the facts of this

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case, compel Cooper to testify before a commissioner on behalf of the complainant?

The contention of appellee is that the authority for the order finding appellant in contempt is based upon section 24, ch. 51, Rev. St. (J. & A. ¶ 5541), and the inherent power of a court of chancery to enforce the attendance of witnesses thereunder.

Appellee's position is that where a bill is filed which *prima facie* states a cause of action, the complainant has the right to have depositions taken to support the allegations of the bill, without any order of court, upon giving the notice required in section 24, *supra*, without issue being joined, and against the objection of the witness.

On the other hand, appellant contends that as section 36, ch. 51, Rev. St. (J. & A. ¶ 5553) has been declared unconstitutional, no deposition can be taken before issue joined without the consent of the witness. He further contends that the matter was not properly before the master, the cause not having been referred; that it could not be referred, as it was not at issue.

The general mode of examining witnesses in equity, formerly, was by interrogatories in writing, conducted before an examiner. The witness did not testify *viva voce* in open court as at law. 1 Daniell's Chancery Pl. & Pr. (5th Am. Ed.) *920; 3 Greenl. Ev., sec. 312; *White v. Toledo, St. L. & K. C. R. R. Co.*, 79 Fed. 133; *McClay v. Norris*, 9 Ill. 370. The common-law courts had no power to procure testimony by deposition. *Una v. Dodd*, 38 N. J. Eq. 460; *Amory v. Fellowes*, 5 Mass. 219. Before a deposition *de bene esse* could be taken under the early practice of the court of chancery in England, it was necessary, in every instance, to apply to the court and support the same by petition or affidavit, showing that the witness whose deposition was sought was above the age of seventy years, dangerously ill, about to go abroad, or in other cases which come within the same principle. If the court

was satisfied with the showing, an order was entered granting leave. This might be done even before appearance of the defendant. The examination was only a provisional measure to guard against the loss of important evidence before the cause was ripe for a regular examination, and the deposition, when so taken, could not be used without an order of court. 1 Daniell's Chancery Pl. & Pr. (5th Am. Ed.) *934-*940. This procedure has been greatly modified by the statutes of the several States. It is not necessary, in this State, to obtain leave of court to take the deposition of a witness in a chancery proceeding. Section 24, ch. 51, Rev. St. (J. & A. ¶ 5541); *Doyle v. Wiley*, 15 Ill. 576; *Sproule v. Samuel*, 5 Ill. 136. And it is now permissible to introduce oral testimony. Section 38, ch. 51, Rev. St. (J. & A. ¶ 5555).

Section 24 (J. & A. ¶ 5541), *supra*, enacted in 1845, is as follows:

“When the testimony of any witness, residing or being within this State, shall be necessary in any suit in chancery in this State, the party wishing to use the same may cause the deposition of such witness to be taken before any judge, justice of the peace, clerk of a court, master in chancery or notary public, without a commission or filing interrogations for such purpose, on giving to the adverse party or his attorney ten days' notice of the time and place of taking the same, and one day in addition thereto (Sundays inclusive) for every fifty miles' travel from the place of holding the court to the place where such deposition is to be taken. If the party entitled to notice and his attorney resides in the county where the deposition is to be taken, five days' notice shall be sufficient.”

Section 36, ch. 51 (J. & A. ¶ 5553) provides that any commissioner taking a deposition where a witness who has been subpoenaed refuses to respond, may make a report of the same to the clerk of the Circuit Court, “and thereupon, attachment shall issue, out of said court against such offending witness, returnable forth-

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with, before the Circuit Court of such county * * * who shall hear and determine the matter in a summary way;" and if the court finds that the refusal of the witness was wilful and without excuse, the witness may be punished accordingly. Our Supreme Court, in passing on this section, in the case of *McIntyre v. People*, 227 Ill. 26, said (p. 28):

"So much of it as authorized the circuit court or circuit judge to punish in a summary manner, by fine or imprisonment, a person who refuses to obey the subpoena of a notary public to appear and have his deposition taken or subscribe his name to his deposition in a case pending before a court in another State (Kansas) was unconstitutional, as contrary to section 9 of article 2 of our constitution." Citing *Puterbaugh v. Smith*, 131 Ill. 199.

Appellant's contention is that the court has no power, except by consent of the parties, to make an order of reference of a cause until the same is at issue, and that as the case at bar was not at issue, no order of reference could be entered; that, therefore, the matter was not properly before the master, and the proceedings were void. This contention is not applicable to the facts in the case. There is no contention that the case was referred to Mason as a master. In this case, Mason is not exercising the power of a master in chancery, as authorized in chapter 90, Rev. St. (J. & A. §§ 7364-7376), but is acting simply as a commissioner or examiner under said section 24, just as a justice of the peace or notary public would act under the same section.

Appellant's position in the lower court was as above stated. In this court, he now urges an additional ground, viz., that appellee made no showing of necessity, as required by said section 24. This is urged for the first time in this court, and under a long line of decisions of the Supreme Court of this State, the point was waived. In view, however, of the fact that

the point has been argued by both sides in the printed briefs and on the oral argument, we will consider it.

In the case of *Doyle v. Wiley*, 15 Ill. 576, the court was considering the admissibility of depositions taken in a suit in chancery where, after they were taken, the bill was dismissed and a supplemental bill filed, the parties and issues being the same. The court there said (p. 577):

“The argument is, that at the time the depositions were taken, there was no issue to which they could apply. That as there was nothing yet to prove, the depositions were entirely irrelevant. That as the testimony was not relevant to any issue in the suit, perjury could not be assigned upon it, and hence it lacks one of the important safeguards against perjury, to which the party was entitled.

There was certainly no issue formed at the time the depositions were taken, but it does not follow that the depositions were necessarily irrelevant, or that perjury could not be assigned upon them. Depositions taken before an issue is formed are called *de bene esse* depositions, and have been always known to the courts of chancery in England and it was never heard that they should be treated as irrelevant, or that perjury could not be assigned upon them, because no issue was yet formed in the suit. It is true such depositions could not be taken without a special order of the court for that purpose. Nor, indeed, could any depositions be taken in a chancery suit, according to the English practice, without an order of the court for that purpose. Our statute, however, has changed the practice on this subject, and allows the party to take his depositions without any leave or order of the court. And the doubt with us has been, whether the statute dispenses with the order for taking depositions in all cases, or whether the order is still required for taking depositions *de bene esse* for there can be no doubt that the legislature never designed to prohibit the taking of such depositions altogether.”

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The court then quotes from section 24, *supra*, and also from section 34, ch. 51 (J. & A. ¶ 5551), which provides that depositions taken are competent evidence, and may be read the same as if the witness had been present in open court, and continuing, said (p. 578):

“The first section quoted (section 24, *supra*) was certainly designed to supersede the necessity for getting an order of the court for the taking of depositions, and there can be no good reason for saying that it was the intention of the legislature to dispense with such order in one case and not in another. Whenever the testimony of a witness shall be necessary in any suit in chancery, the statute says his deposition may be taken. The argument is, that no testimony is necessary till the answer is filed and an issue formed, so that it is certain that the complainant is obliged to prove some part of his case, and that it is only in case of such necessity that the statute authorizes any deposition to be taken; and that any deposition which is taken without such necessity is not sanctioned by law, and that the witness could not be convicted of perjury upon such deposition. This, we think, would be carrying the rule further than was designed by the legislature. We are inclined to hold that, when a party files a bill, the statute authorizes him to take depositions to substantiate its averments, and at least, until they shall have been admitted by the defendant, such testimony is necessary for the complainant; and that he may proceed to take his depositions *de bene esse*, if he chooses, without an order.”

The *Doyle* case, *supra*, was approved by our Supreme Court in the case of *Harding v. American Glucose Co.*, 182 Ill. 551, where the court said (p. 590): “Complainants had the right, even before issue joined, to take depositions to substantiate the averments of their bill. (*Doyle v. Wiley*, 15 Ill. 576.)”

Appellant seeks to distinguish the *Doyle* case, *supra*, from the case at bar, in that there the depositions may have been taken by consent, and that what

the court said on the question of necessity was *obiter dicta*. In our opinion, the argument is untenable, and under the doctrine in the *Doyle* case, *supra*, we are constrained to hold that complainant, upon filing his bill, may compel the defendant to testify before the commissioner, without any order of court and without any showing of necessity other than as may appear from the bill. The wisdom or unwisdom of this law is a question for the Legislature and not for the court.

The answer to appellant's objection that if he is compelled to testify before issue formed, his private affairs may be illegally gone into, is that the examination should be confined to the allegations of the bill.

The remaining question to be disposed of is, Is there any law, either statutory or common, whereby the appellant may be punished for refusal to testify? That part of section 36, ch. 51 (J. & A. ¶ 5553) which provides that a witness may be punished for refusing to obey the subpoena of a notary public, as we have already said, is unconstitutional.

It is elementary that a court of chancery has inherent power to punish as for contempt any witness who refuses to obey an order of court. *Clark v. People*, 1 Ill. (Breese) 340; *People v. Wilson*, 64 Ill. 195. *People v. Cohen*, 163 Ill. App. 115. The power of courts to punish contempts is as incontestable as the fact that the court exists. *Una v. Dodd, supra*.

In the *McIntyre* case, *supra*, the facts were these: There was a chancery suit pending. A notice was given that the deposition of McIntyre would be taken before a notary public, the time and place being mentioned. A subpoena was served on McIntyre, and his fees paid. He refused to appear. The notary filed a report in the Superior Court of the facts. The court, after examination, found McIntyre guilty of contempt for such refusal, ordered an attachment issued and McIntyre brought before the court, which was done.

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Afterwards, an answer was filed, setting up that said section 36 was unconstitutional and void. After hearing, the court adjudged McIntyre guilty of contempt and he was fined fifty dollars. In default of payment he was to be confined in the county jail. The court, after discussing the *Puterbaugh* case, *supra*, said (p. 29): "No order of any kind had been entered by the Superior Court as to the taking of this deposition, previous to the subpoena being issued by the notary public." The court then refers to the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, and in discussing the power of the court to impose a fine or to imprison to compel performance of legal duties, held that such power could only be exercised by a competent judicial tribunal having jurisdiction, and continuing, said (p. 30): "That such power cannot be committed to a subordinate or executive tribunal for final determination. In the case at bar the Superior Court adjudged appellant guilty of contempt, not for any act he had done in contravention of the judicial authority of that court, but for disobeying the subpoena of a notary public." The judgment was reversed and the cause remanded. In that case, the court clearly pointed out the difference between a refusal of a witness to obey the subpoena of a notary public and a refusal to obey an order of a court having power to enter the same. It will be noted that the punishment there was imposed for failure to obey the subpoena of a notary public. In the case at bar, appellant was punished not for failure to obey the subpoena of Mason, but for a failure to obey an order of the Circuit Court.

We therefore hold that appellant, in disobeying the order of the Circuit Court, was guilty of contempt, and that the court had the inherent power to punish him for said contempt. The order of the Circuit Court of Cook county will be affirmed.

Affirmed.

Jennings v. Baltimore & O. R. Co., 195 Ill. App. 543.

James A. Jennings, Appellant, v. Baltimore & Ohio Railroad Company et al., Appellees.

Gen. No. 19,867. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 8, 1915. Rehearing denied December 21, 1915.

Statement of the Case.

Action by James A. Jennings, plaintiff, against the Baltimore & Ohio Railroad Company, and the Baltimore and Ohio Terminal Railroad Company, defendants, in the Circuit Court of Cook county, to recover for injuries sustained by plaintiff in a collision between plaintiff's automobile and defendants' train. From a judgment for defendant, plaintiff appeals.

The collision occurred in the City of Chicago, May 4, 1911, when plaintiff's automobile, while proceeding north on a throughfare known as Independence boulevard, was struck by the rear end of an east-bound passenger train.

The declaration contained four counts, wherein it was alleged that defendants owned and operated a certain railroad in the City of Chicago, which railroad crossed a certain public highway known as Independence boulevard; that, while plaintiff, in the exercise of due care and diligence for his own safety, was riding in an automobile over the crossing, made by the intersection of said railroad with Independence boulevard, he was struck by the rear end of a train of cars, which train of cars was owned and operated by said defendants and was under the control of the servants of the defendants. Said counts charged defendants with negligence (1) in the operation of said train, (2) in the failure to ring a bell or sound a whistle, as provided by our statutes, and (3) in the conduct of the crossing flagman—a servant of said

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defendants—in recklessly, wilfully and negligently beckoning plaintiff to enter upon the crossing while said train was approaching.

Both defendants pleaded the general issue. The defendant, the Baltimore & Ohio Railroad Company, however, in addition, included in said plea a statement which it maintains was a notice in writing, under the statute, of a special defense to be relied upon at the trial, which statement was as follows:

“Said defendant, the Baltimore & Ohio Railroad Company, further says that it was not the owner of or in control of or in possession of the certain locomotive engine and the certain train of cars thereto attached, or of the railroad or railroad tracks upon which the same were driven, as alleged in said declaration, and the several counts thereof, and that said locomotive engine and train of cars referred to in said declaration and the several counts thereof, was not at the times in said declaration mentioned, or any of them, under the care and management of any servants of this defendant.”

Upon the trial below plaintiff introduced evidence tending to prove the allegation of the declaration. Plaintiff also introduced in evidence certain facts which he claims, in themselves, or by the reasonable inferences that flow therefrom tended to show, that the defendant, the Baltimore & Ohio Railroad Company, owned controlled and operated the train of cars which collided with plaintiff's automobile, and that the said engine and train of cars and crossing were under the care and management of servants of the said Baltimore & Ohio Railroad Company.

At the close of plaintiff's case, the Baltimore & Ohio Railroad Company, after asking the court to instruct the jury for the defendant and submitting a written instruction to that effect, rested. The defendant, the Baltimore & Ohio Chicago Terminal, after submitting a similar motion and instruction, proceeded with its defense under its plea of general issue. At

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the close of all the evidence, both defendants again renewed their motions for an instructed verdict, which motions were denied, whereupon the cause was submitted to the jury and the verdict returned upon which the judgment herein complained of was entered.

CHARLES R. WHITMAN, for appellant; LLOYD C. WHITMAN, of counsel.

CALHOUN, LYFORD & SHEEAN, for appellee; CHARLES D. CLARK, of counsel.

MR. JUSTICE PAM delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 763*—*when instruction as to admission of ownership, management and control of train properly refused.* In an action to recover for injuries sustained by the alleged negligent operation of a railroad train, a request by plaintiff that the jury be instructed as matter of law that one of the defendants in the action admitted its ownership, management and control of the train in question by pleading the general issue in the action, *held* properly refused where such point was raised for the first time by plaintiff at the close of all the evidence, after having offered evidence as to such question as part of his case, such conduct being inconsistent, and where it also appeared that defendant filed with its plea a notice of special defenses which was sufficient under Hurd's Rev. St., ch. 110, sec. 48 (J. & A. ¶ 8593), providing for the filing with such a plea of written notice of special defenses relied on.

2. INSTRUCTIONS, § 137*—*when defendant may request instruction on plaintiff's evidence.* A defendant which has rested without offering any evidence in defense may at the close of plaintiff's evidence request that the jury be instructed, as to it, only on plaintiff's evidence, and further, that the jury be instructed not to consider, as to it, the evidence offered in defense by a codefendant.

3. INSTRUCTIONS, § 137*—*when right to instruction on plaintiff's evidence waived.* A defendant who rests without offering evidence in defense and cross-examines the witnesses offered by a codefendant waives his right to request that the jury be instructed, as to it, solely on plaintiff's evidence, and also to request that the jury be instructed not to consider, as to it, any evidence offered in defense by a codefendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. INSTRUCTIONS, § 135*—*when right to instruction on plaintiff's evidence waived.* A defendant who has rested without offering evidence in defense submits to the jury, as to it, all the evidence in the case where, at the close of all the evidence, it requests a peremptory instruction in its favor as well as instructions on the facts and on the law in the case, without confining such requests to plaintiff's evidence, for which reason if the jury find a verdict of guilty, such defendant will be precluded from asserting that the jury were not warranted in considering, as to it, all the evidence in the case.

5. RAILROADS, § 770*—*when instructions conform to issues.* In an action to recover for injuries sustained by the alleged negligent operation of a train, instructions requested by plaintiff examined and *held* to submit to the jury the question of the ownership, management and operation of the train by a particular defendant.

6. RAILROADS, § 733*—*sufficiency of evidence as to negligent operation.* In an action to recover for injuries sustained by the alleged negligent operation of a railroad train, where the action was against two defendants, one of whom made no denial of the ownership and control of the agencies involved, a verdict of *not guilty* against one defendant which offers no evidence in defense will be sustained by the evidence where the jury are warranted in considering, as against such defendant, the evidence offered in defense by its codefendant, if a similar verdict as to such codefendant, found on such evidence, would be sustained thereby.

7. RAILROADS, § 770*—*when instruction as to warning signal by locomotive applicable to evidence.* In an action to recover for injuries sustained through the alleged negligent operation of a railroad train, *held* that an instruction as to the effect of sounding the locomotive's bell or blowing its whistle was based on sufficient evidence in the record, where such record showed that such bell was sounded by an electric ringer from the time the train reached the city limits until it came to a stop after the accident.

8. RAILROADS, § 766*—*when instruction on doctrine of last clear chance properly refused as misleading.* In an action to recover for injuries sustained by the alleged negligent operation of a railroad train, a requested instruction presenting the doctrine of "last clear chance" *held* properly refused, where the instruction was involved and misleading and did not correctly present such doctrine to the jury.

9. INSTRUCTIONS, § 46*—*necessity that instruction not invade province of jury.* An instruction which clearly invades the province of the jury is properly refused.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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10. TRIAL, § 155*—*province of jury to consider conflicting testimony.* An issue presented by conflicting testimony is a question of fact for the jury.

11. APPEAL AND ERROR, § 1410*—*when verdict will not be disturbed as against weight of evidence.* Where the evidence is conflicting, the verdict of a jury will not be disturbed on review unless clearly and manifestly against the weight of the evidence.

12. RAILROADS, § 733*—*sufficiency of evidence as to negligent operation.* In an action to recover for injuries sustained by the alleged negligent operation of a railroad train, judgment for defendants *held* sustained by the evidence.

13. DAMAGES, § 183*—*when evidence as to having family inadmissible.* In an action to recover for injuries sustained by the alleged negligent operation of a railroad train, evidence that before the injury plaintiff was married and had children, *held* properly excluded.

14. JUDGMENT, § 199*—*when error as to one party as affecting other party immaterial.* In an action against codefendants, the question as to the vitiation of the judgment as to both defendants by its invalidity as to one, *held* immaterial in view of the decision of the court on other questions presented by the record.

Edwin C. Day, Trustee, Appellant, v. Michael Zimmer et al., Appellees.

Gen. No. 21,863. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1915. Appeal dismissed. Opinion filed December 13, 1915.

Statement of the Case.

Action by Edwin C. Day, trustee, etc., plaintiff, against Michael Zimmer *et al.*, defendants, in the Circuit Court of Cook county. From a judgment for plaintiff, defendant appeals.

The decree appealed from was entered April 30, 1915. In this decree the time limit of thirty days was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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fixed within which the appeal bond must be filed, and sixty days were allowed for the filing of a certificate of evidence.

The appeal bond was filed and approved June 1, 1915. The certificate of evidence was signed by Judge Baldwin (Judge Windes being the trial judge), September 21, 1915, *nunc pro tunc* as of July 20, 1915, and order filed as of the last-named date.

On July 1, 1915, an order was entered extending the time within which to file the certificate of evidence thirty days from the 29th of June, 1915. The decree appealed from was entered at the April term of the court and no extension of time within which to file the bond was asked or allowed at that term, and the bond was filed and approved after the lapse of the time allowed by the court and at the succeeding May term. On July 1, 1915, more than sixty days after the entering of the decree and after the term at which the appeal was allowed, an order was entered enlarging the time in which to file the certificate of evidence thirty days from June 29, 1915.

THOMAS J. JOHNSON, for appellant.

BITHER & GOFF, for appellees.

Mr. JUSTICE HOLDOM delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 627*—*when right of appeal from Circuit Court lost.* If the time allowed in the order in the Circuit Court granting an appeal for filing an appeal bond expires before the appeal bond is filed, without an extension within the time allowed in the order, the right of appeal is lost.

2. APPEAL AND ERROR, § 861*—*when time for filing certificate of evidence improperly extended.* An order of the Circuit Court extending the time for filing a certificate of evidence entered at a term subsequent to that at which the appeal was taken is without force, the court having no jurisdiction to enter such order at such time.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. APPEAL AND ERROR, § 858*—*when certificate of evidence signed by judge not sitting in case a nullity.* A certificate of evidence signed by a judge who did not sit in the case or enter the decree appealed from is a nullity where no reason is shown by the record for his so doing.

4. APPEAL AND ERROR, § 858*—*when failure to file certificate of evidence in time fatal.* Where a certificate of evidence is not seasonably filed, a motion of appellee to strike will be allowed by the Appellate Court.

Sidney S. David, Defendant in Error, v. Mark May et al., Plaintiffs in Error.

Gen. No. 20,504. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 21, 1915.

Statement of the Case.

Action by Sidney S. David, plaintiff, against Mark May, Walter E. Hart and Thomas W. Thompson, defendants, in the Municipal Court of Chicago to recover for the conversion of money alleged to have been procured from plaintiff on false representations. To reverse a judgment for plaintiff for \$250, defendants prosecute this writ of error.

In plaintiff's amended statement of claim it is alleged that:

“Plaintiff's claim is to recover from the defendants, jointly and severally, the sum of \$250, with interest thereon from April 19, 1913, due and owing to the plaintiff by the defendants and converted by them and each of them to their own use; that defendants procured from the plaintiff the sum of \$250 upon the representation and condition that they were forming a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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bank to be known as the Public Trust & Savings Bank, and that said defendants have failed to and have not organized said bank and have abandoned said project; that plaintiff has demanded from the defendants the return of said \$250 * * * and that they and each of them have failed, neglected and refuse to return said money; that defendants fraudulently and falsely represented to plaintiff that the organization of said bank would be completed not later than July 1, 1913, and would issue stock therein to the plaintiff, which they have failed, neglected and refuse to do."

The defendant May was defaulted for failure to file an affidavit of merits. The other defendants, Hart and Thompson, filed separate affidavits of merits denying the allegations of plaintiff's statement of claim and denying joint liability.

Upon the trial plaintiff testified that on April 19, 1913, he received a call from the defendant Mark May; that May stated that he, in connection with Hart and Thompson, was organizing a bank to be called the Public Trust & Savings Bank and to be located in the Hearst Building, Chicago; that it was to be organized and ready for business by July 1, 1913, and that he desired plaintiff to buy certain shares of stock in the bank; that he (plaintiff) thereupon purchased twenty shares of said stock and signed and delivered to May his check for \$250, the same being a ten per cent. payment on said shares, and that he at the same time received from May a written receipt. The check and receipt were admitted in evidence. The check, dated April 19, 1913, was drawn on the Northwest State Bank and made payable to the "Public Trust & Savings Bank," was indorsed "Public Trust & Savings Bank Organization, Mark May, Thomas W. Thompson, W. E. Hart," and also "Lincoln State Bank," and was paid by said Northwest State Bank and returned, canceled, to plaintiff. It does not appear from the evidence that the indorsements thereon of the defendants, Thompson and Hart, were in their handwriting. The

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said receipt was also dated April 19, 1913, was signed by the defendant May "Mark May, W. E. Hart, Thomas W. Thompson, Commissioners, by Mark May," and was as follows: "Received of Sidney S. David \$250, being partial payment for 20 shares of the capital stock of Public Trust & Savings Bank. Certificate of stock will be issued to the legal holder hereof when the Capital is fully paid in, upon surrender of this interim receipt to the Commissioners named hereon." Plaintiff further testified that he never received any shares of stock in the Public Trust & Savings Bank, that no shares were ever tendered to him by any one and that the money, so paid out, was never returned to him; that about July 18, 1913, he telephoned the defendant May inquiring why the bank had not been organized and why he had not received the shares of stock for which he had subscribed, that May answered that he had had trouble in raising the necessary capital and had been delayed, and that plaintiff replied that if the organization was not completed by August 1, 1913, his money must be returned to him; that he (plaintiff) never had any conversation or business transactions with either Thompson or Hart, and that no representations of any kind were ever made to him by either Thompson or Hart. R. J. Roepke, chief clerk of the Lincoln State Bank and a witness for plaintiff, testified that said bank had an account with the "Public Trust & Savings Bank, Mark May, Walter E. Hart and Thomas W. Thompson"; that he (Roepke) knew Mark May only; that moneys had been deposited by said May to the credit of said account; that the account was still open; that certain moneys had been withdrawn from said account by means of checks signed by the defendants, as commissioners, and that there was in said account the sum of \$62.50 to the credit of said defendants. Two checks were identified by the witness as having been drawn on said account and paid, and were admitted

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in evidence. One check was for \$625, dated June 27, 1913, and the other check was for \$25, dated July 3, 1913. They were signed "Public Trust & Savings Bank, Commissioners, Mark May, Walter E. Hart, Thomas W. Thompson."

The defendant May did not testify. The defendants Hart and Thompson testified that they, together with the defendant May, acted as commissioners in the organization of the Public Trust & Savings Bank, which organization had not yet been completed; that no stock had been issued to any one; that they (Hart and Thompson) joined with May at his request in signing the checks above mentioned and other checks, but that they could not tell definitely for what specific purposes certain of the funds so deposited in said Lincoln State Bank had been disbursed, as they depended largely on May to attend to the disbursements; and that they never received or used for their own benefit any of the moneys so deposited or collected on plaintiff's subscription to said stock.

The defendants Hart and Thompson sought to introduce in evidence a document signed by the plaintiff at the time he delivered to May his check for \$250, but the court refused to admit the same in evidence and an exception was taken. The document is as follows:

**"IN THE ORGANIZATION OF THE PUBLIC TRUST & SAVINGS
BANK OF CHICAGO.**

"I desire to become a stockholder in the PUBLIC TRUST AND SAVINGS BANK OF CHICAGO to be organized under an Act of the State of Illinois 'concerning Corporations with Banking powers' with a capital stock of Three Hundred Thousand Dollars (\$300,000) and a surplus fund of Sixty Thousand Dollars (\$60,000).

"I hereby subscribe for Twenty (20) shares of the Capital Stock of the said Public Trust and Savings Bank of Chicago, at One Hundred and Twenty-five Dollars each and agree to pay for same as follows:

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(10%) to accompany this subscription and the balance on or before demand is made by the Directors to be elected by the subscribers.

“It is understood and agreed that the sum of (\$5.00) a share of the above number of shares herein subscribed for is to be used to defray organization fees and expenses.

“Chicago, April 19, 1913.

“(Signed) SIDNEY A. DAVID.”

The defendants Hart and Thompson also sought to introduce in evidence an agreement made by the defendant May for a lease of certain premises, to be used by the bank when finally organized, and to show the expenditure of certain moneys in order to secure said lease, but the court would not allow said agreement to be introduced or said expenditures to be shown, and defendants excepted. The court also declined to permit defendants to show for what purpose the checks for \$625 and \$25, previously referred to, were drawn, and defendants excepted.

PRINGLE, REID & TERWILLIGER, for plaintiffs in error.

WILLIAM FRIEDMAN and WILLIAM F. ADER, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. TROVER AND CONVERSION, § 38*—*when agreement subscribing for stock erroneously excluded as evidence.* In an action to recover for conversion of money alleged to have been procured from plaintiff by false representations, where it appeared that the money alleged to have been converted was a part payment on a subscription for stock in a bank which was never organized, evidence of the written agreement wherein plaintiff subscribed for such stock, *held* erroneously excluded, it appearing that such agreement contained a clause authorizing defendants to use for organization purposes a proportion of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the amount alleged to have been converted, such agreement being competent as tending to show, in connection with other evidence, that defendants were not liable to plaintiff in any form of action for the full amount of such part payment.

2. **TROVER AND CONVERSION, § 38***—*when evidence as to disbursement of money erroneously excluded.* In an action to recover for conversion of money alleged to have been procured from plaintiff by false representations, where it appeared that the money alleged to have been converted was a part payment on a subscription for stock in a bank which was never organized, and where the subscription agreement contained a provision that a proportion of such amount might be used for organization purposes, evidence that money had been disbursed for organization purposes by defendants *held* erroneously excluded.

3. **ASSUMPSIT, § 50***—*when action for money had and received lies upon failure of consideration.* A person who pays money for shares in a company which never comes into existence pays it on a consideration which fails, and may recover such amount in an action of money had and received unless it be shown that he has consented to or acquiesced in the application made of such money by those into whose hands it comes.

J. A. Svenson, Defendant in Error, v. George C. Stamm et al., Plaintiffs in Error.

Ger. No. 20,798. (Not to be reported in full)

Error to the Municipal Court of Chicago; the Hon. FRED C. HILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed December 21, 1915.

Statement of the Case.

Action by J. A. Svenson, plaintiff, against George C. Stamm, Henry Stafford and Nils A. Sundholm, defendants, in the Municipal Court of Chicago, to enforce a mechanic's lien on a contract for building stairs in a building. To reverse a judgment for plain-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tiff for \$550 against defendants jointly, defendants prosecute this writ of error.

In his statement of claim plaintiff alleged that his claim was for \$550, and was "for balance owing on fifteen (15) flights of main stairs placed in building at No. 912-932 Airdrie Place, Chicago." An authorized agent of the four original defendants filed an affidavit of merits in their behalf in which it was denied that any balance on said stairs was due to plaintiff from them or any one of them. On May 27, 1914, on motion of plaintiff, the court ordered that all records, papers and proceedings be amended by making "Carl A. Rydquist and Nils A. Sundholm, doing business as Rydquist & Sundholm, co-defendants herein." Subsequently both Rydquist and Sundholm were duly served with process and each entered a separate appearance. Rydquist filed an affidavit of merits in which he denied owing any sum of money to plaintiff, and alleged that he had never purchased any stairs from plaintiff; that he had not been a partner with Sundholm since some time in May, 1913, and that plaintiff had had notice that he was not a partner with Sundholm when he (plaintiff) sold the stairs in question to Sundholm. On June 15, 1914, Sundholm was defaulted for failure to file an affidavit of merits. At the commencement of the trial, July 1, 1914, which was before the court without a jury, plaintiff voluntarily dismissed the suit as to defendant Rydquist; and during the trial the court dismissed the suit as to the defendants Edith M. Stamm and May Stafford.

At the conclusion of all the evidence, the defendants George C. Stamm and Henry Stafford moved that the court dismiss the suit as to them, which motion the court overruled and said defendants excepted.

The evidence disclosed, in substance, the following facts: The premises and building at Nos. 912-932 Airdrie Place, Chicago, were in May, 1913, owned by the four defendants, George C. Stamm and Henry Stafford

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and their respective wives, and they continued to be the owners up to the time of the trial. The defendants George C. Stamm and Henry Stafford were partners, and they entered into a contract for the erection of a building upon said premises with the Rydquist & Sundholm Company, which was then a partnership, composed of Carl A. Rydquist and Nils A. Sundholm. On May 16, 1913, after the making of the original contract, plaintiff, who was in the business of manufacturing stairs, entered into a subcontract in writing with said Rydquist & Sundholm Company, wherein he agreed to furnish and set up in said building fifteen flights of main stairs, according to certain plans and specifications, for the sum of \$1,150. A few days after the signing of said subcontract, plaintiff informed Henry Stafford that he had made such contract, that he did not think said company was financially responsible and that he was not satisfied to go ahead with the contract. According to plaintiff's testimony Stafford replied: "I am going to superintend the job myself. You go ahead and do the work. I will take care of you. I will see that your money is paid." About June 1, 1913, according to the testimony of two sons of plaintiff, after the stairs were ready for delivery, Stafford called at plaintiff's place of business to inspect the stairs, and upon one of the sons expressing doubt as to the financial responsibility of said Rydquist & Sundholm Company, Stafford said: "Your money will be taken care of. I will *hold out* your money, and see that it is paid to you." Stafford denied that he ever told plaintiff or any of his representatives that he would personally guaranty plaintiff's account for the stairs or would "hold out" any money therefor. About July 24, 1913, after the stairs had been delivered at the building, one of plaintiff's sons called on Stafford and asked for a payment on account. According to the son's testimony, Stafford said that he should "get an order from the Rydquist & Sundholm Company," and

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that the most he (Stafford) could pay at that time was \$600. The witness procured such an order and the same was introduced in evidence. It is dated July 24, 1913, and is signed "Rydquist & Sundholm Co., W. A. Sundholm," and is addressed to "Stafford & Stamm." In the body of the order are the words: "Please pay to the order of Jos. Svenson the sum of \$600 and charge to my account." Below the signature are the words: "Paid \$600. J. A. Svenson, by Erick Svenson." After the work of setting up the stairs in the building had been fully completed, one of the sons of plaintiff again called on Stafford and asked for the balance due, \$550, on plaintiff's work, and Stafford said that the work was satisfactory and suggested that said son call upon Stamm relative to Stamm and Stafford and their respective wives giving to plaintiff a note for said balance. Said son thereupon called upon Stamm and presented him with an order for \$550 from Rydquist & Sundholm Company, and asked for payment. Some conversation was had regarding Stamm and Stafford and their wives giving plaintiff a note for said balance, and Stamm finally said that he would later advise plaintiff as to what they would do. No note was ever given plaintiff. Subsequently plaintiff served subcontractor's notices of a mechanic's lien, dated October 20, 1913, on Henry and May Stafford (whether served on the Stamms does not appear), claiming a lien on said premises and building for the material and labor for constructing said stairs, and that there was due plaintiff "on the 23rd day of August, 1913," the sum of \$550 therefor. A certified copy of the records and proceedings in a certain garnishment suit in said Municipal Court, case No. 280,299, was introduced in evidence. It therein appeared that on April 20, 1914 (after the present suit was commenced), the Columbia Cabinet Company, an Illinois corporation, recovered a judgment in said court for \$1,007 against "Nils A. Sundholm and Carl A. Rydquist, doing business as

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Rydquist-Sundholm Company''; that a garnishee summons was issued for said Henry Stafford and George C. Stamm, and others; that on May 14, 1914, said Stafford and Stamm, as garnishees, filed a joint answer, verified by affidavit, in which they admitted having in their possession money, to the amount of \$356.30, due and owing said Rydquist-Sundholm Company, for balance under a certain contract for the erection of a certain building, which amount was subject to the order of the court, and alleged that said money was claimed by "J. A. Svenson," and others (naming them), and asked that said adverse claimants appear, etc.; that subsequently plaintiff entered his appearance in said garnishment suit; and that on May 27, 1914 (before the judgment in the present suit was entered), the court adjudged that "judgment be entered on the finding as to the claim of the Columbia Cabinet Company, to the fund in the hands of the garnishees, and that the right thereto is in the Columbia Cabinet Company."

ADAMS, CREWS, BOBB & WESCOTT, for plaintiff in error.

M. M. JACOBS, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. **MECHANICS' LIENS, § 196**—*when evidence insufficient to establish joint liability.* In an action to enforce a mechanic's lien for constructing stairs in a building, where the judgment was against three defendants jointly, evidence examined and *held* insufficient to prove a joint liability.

2. **MUNICIPAL COURT OF CHICAGO, § 13***—*when statement of claim does not warrant joint judgment.* In an action by a subcontractor to enforce a mechanic's lien, where plaintiff's statement of claim does not show that he is seeking a judgment against the owners of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the building and the original contractor jointly, such a judgment is erroneous under section 28 of the Mechanics' Liens Act (J. & A. § 7166), providing that all suits and actions by subcontractors shall be brought against both contractor and owner jointly and no decree or judgment shall be entered until both are brought before the court by process.

3. MECHANICS' LIENS, § 202*—*when judgment for subcontractor erroneous.* In an action under Mechanics' Liens Act, section 28 (J. & A. § 7166), by a subcontractor to enforce a mechanic's lien for building stairs in a building, a judgment not against all the owners and all the contractors is erroneous.

Thomas MacLagan, Appellee, v. Chicago Telephone Company, Appellant.

Gen. No. 20,958. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. OSCAR H. HEARD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed with finding of fact. Opinion filed December 21, 1915.

Statement of the Case.

Action by Thomas MacLagan, plaintiff, against the Chicago Telephone Company, defendant, in the Circuit Court of Cook county, to recover for personal injuries sustained by reason of a fall from a telephone pole. From a judgment for plaintiff for \$7,000, defendant appeals.

HOLT, CUTTING & SIDLEY, for appellant.

FRANCIS X. BUSCH, FRANK A. ROCKHOLD and DAVID G. ROBERTSON, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Abstract of the Decision.

1. MASTER AND SERVANT, § 685*—*sufficiency of evidence to sustain verdict for injuries due to defective appliances.* In order to recover in an action for personal injuries sustained by a servant as a result of defects in the appliances of the business, plaintiff must prove (1) that the appliance was defective; (2) that the master had or should have had notice or knowledge of such defect; (3) that the servant did not know of the defect, and that his means of knowledge were not equal to those possessed by the master.

2. MASTER AND SERVANT, § 120*—*what constitutes an appliance.* A telephone pole is an appliance for the support of the telephone wires, and, when used by a lineman as a means of reaching the wires, serves the same purpose as a ladder or scaffolding.

3. MASTER AND SERVANT, § 698*—*sufficiency of evidence as to knowledge of defective telephone pole by employee.* In an action by a servant against a master to recover for personal injuries sustained by a fall from a telephone pole, due to the breaking of an alleged defective brace supporting a cross-arm on such pole, evidence held sufficient to prove that plaintiff's means of knowing the condition of such brace and arm were equal to those of defendant, it appearing that plaintiff was an experienced repairman who for four years prior to the accident had been working on similar poles and cross-arms.

4. MASTER AND SERVANT, § 699*—*when servant repairing telephone line guilty of contributory negligence.* In an action by a servant against a master to recover for injuries sustained as a result of falling from a telephone pole on account of a defective brace, a recovery held barred by contributory negligence.

5. MASTER AND SERVANT, § 698*—*sufficiency of evidence as to assumption of risk by telephone lineman.* In an action by a servant against a master to recover for injuries sustained as a result of a fall from a telephone pole on account of a defective brace upon which plaintiff rested his weight, held that under the evidence plaintiff assumed the risk, it appearing that plaintiff was an experienced repair man, who for four years prior to the accident had been working on similar poles.

6. MASTER AND SERVANT, § 322*—*when servant repairing telephone line assumes risk.* An experienced employee who is required to climb poles frequently in the course of his duties, and is fully acquainted with the dangers incident to such work, assumes the risk of dangers discoverable by reasonable inspection, the duty of making which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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was imposed upon the employee, in the absence of a separate system of inspection by the master, on which the employee has a right to rely and does rely.

7. MASTER AND SERVANT, § 307—*when duty of telephone lineman to make inspection.* In an action by a servant against a master to recover for personal injuries due to a fall from a telephone pole as the result of the breaking of an alleged defective brace supporting a cross-arm on said pole, where plaintiff was an experienced lineman accustomed to working on such poles, evidence *held* to show that the duty of inspection was imposed on plaintiff, and not on defendant.

**George F. Harding, Jr., Appellant, v. Christopher
Bray, Appellee.**

Gen. No. 20,976. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. M. L. McKINLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Reversed and remanded. Opinion filed December 21, 1915.

Statement of the Case.

Bill by George F. Harding, Jr., complainant, against Christopher Bray, defendant, in the Superior Court of Cook county. From the order dismissing the bill, complainant appeals.

The bill alleged, in substance, that on and prior to December 1, 1902, complainant was and now is the owner in fee of certain vacant and unimproved premises (describing them) situate in Cook county, Illinois, and that during all of said period he has been and now is entitled to all the rents and income therefrom; that the defendant, wrongfully and fraudulently assuming to have the power so to do and without any rights in the same, has during all of the period subsequent to December 1, 1902, leased said premises, without the knowledge or consent of complainant, to various par-

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ties unknown to complainant and for sums unknown to complainant, and has wrongfully collected and converted to his own use the various sums thus wrongfully obtained by him as rent for the same; that complainant has been unable, after diligent inquiry, to ascertain to whom the premises were so leased by the defendant or the amount which defendant has so wrongfully received and converted to his own use, but complainant believes and charges that defendant has received in the aggregate more than the sum of \$1,900; that complainant believes and charges the fact to be that defendant from the sums so wrongfully obtained by him has purchased certain other premises (describing them) in said Cook county, which said other premises belong in equity to complainant, and the defendant has no other property subject to execution or attachment or garnishment, or out of which any decree entered herein in favor of complainant may be satisfied; and that complainant had no knowledge of said wrongful acts of the defendant prior to April 6, 1910, and that all rights of action of complainant against defendant have been wrongfully and fraudulently concealed from complainant by defendant. The bill prayed that the defendant might be required to answer the same (defendant's oath to the answer being waived); that defendant might be required to discover and set forth the various parties to whom said first mentioned premises were leased by defendant, the time which each of the parties occupied the same, the amounts received from said parties, and the dates of the various payments therefor; that said defendant might be enjoined from selling, incumbering or otherwise disposing of the premises so purchased by him; that a receiver thereof might be appointed, that an accounting might be taken in this behalf by and under the direction of the court, and that defendant might be decreed to pay complainant whatever sums might appear to be due complainant, etc.

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To this bill the defendant on June 27, 1910, filed a general demurrer. On March 17, 1913, on motion of the solicitor for defendant, the court ordered that said demurrer be sustained and that leave be granted complainant "to amend his bill of complaint within ten days or stand by his bill of complaint." On February 28, 1914, both parties appearing, the court entered an order to the effect that, the court having previously sustained defendant's general demurrer to said bill, and complainant now electing to stand by his said bill as against said demurrer, "it is ordered that said bill of complaint be and the same is hereby dismissed at complainant's costs."

WILLIAM J. AMMEN, for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

ACCOUNT, § 28*—*when dismissal of bill erroneous.* On general demurrer to a bill praying an accounting, and other relief, averments *held* sufficient to require defendant to answer, for which reason a decree sustaining the demurrer and dismissing the bill was erroneous

The People of the State of Illinois, Complainant, v. Isaac C. Ogden et al., Defendants.

Hiram Coombs (Petitioner), Appellee, v. City of Chicago (Defendant), Appellant.

Gen. No. 20,984.

1. TAXATION, § 662*—*when city holding invalid tax title not entitled to reimbursement out of surplus from tax sale.* In a peti-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tion filed in a bill to foreclose a tax lien, which petition prays an order directing a county treasurer to pay over to petitioner a surplus remaining after the tax sale decreed in the foreclosure action, where the fund is also claimed by a municipal corporation under Act of June 23, 1913, providing that a municipal corporation holding certificates of sale or tax deeds by virtue of Act of 1897, sec. 72 (J. & A. ¶ 1463), authorizing municipal corporations to purchase at tax sales in certain cases, shall be reimbursed to the amount paid by it at such sale before any final judgment shall be entered concerning the title to the land sold, a decree granting the relief prayed by the petition is not erroneous as being in conflict with such Act of June 23, 1913, although such reimbursement is not made by such decree, for the reason that such Act of June 23, 1913, has been declared unconstitutional.

2. TAXATION, § 662*—*when holder of invalid tax title entitled to reimbursement.* Under Hurd's Rev. St., ch. 120, sec. 224 (J. & A. ¶ 9443), providing that any judgment setting aside a tax deed shall provide for the reimbursement of the holder of such deed by the claimant as prerequisite to such claimant's having the benefit of such decree, the holder of a tax title is entitled to reimbursement *only* when such tax deed is set aside by the decree in question.

3. TAXATION, § 662*—*what does not constitute setting aside tax deed.* A decree awarding to the assignee of the owner of land sold for taxes a surplus remaining after such sale does not set aside a tax deed within the meaning of Hurd's Rev. St., ch. 120, sec. 224 (J. & A. ¶ 9443), providing for the reimbursement of the holder of a tax title where the tax deed is set aside by a judgment decree, notwithstanding the fact that such decree denies reimbursement to a municipal corporation holding an invalid certificate of the sale of the same land to it for nonpayment of assessments made against such land for local improvements.

4. EQUITY, § 151*—*what is effect of admissions in bill.* In a petition by the assignee of the owner of land sold for taxes, praying that a surplus remaining after the tax sale be awarded to him, the admission of a claimant under tax certificates that it "makes no claim in this suit as to the title" to the property in question, amounts to an admission that the tax certificates relied on are invalid.

5. TAXATION, § 662*—*when holder of invalid tax title not entitled to reimbursement.* The holder of an invalid tax deed is not entitled to be reimbursed for the amount paid in acquiring the tax title, whether such holder be a city or an individual.

6. ESTOPPEL, § 77*—*when assignee of surplus from tax sale not estopped to question right of city to reimbursement.* One to whom

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the owner of land sold for taxes has assigned his right to the surplus remaining after the sale is not estopped to question the right of a city to be reimbursed out of such surplus for the amounts paid at a sale of the same land to it for nonpayment of assessments for local improvements, by reason of the fact that such assignee had no greater rights than such assignor.

7. TAXATION, § 662*—*when city not entitled to reimbursement of amount paid at tax sale.* A decree awarding a surplus remaining after the sale of land for taxes to the assignee of the right of the owner of the land in such surplus does not violate the rule that one cannot profit by his own wrong, although such decree denies the right of a city to be reimbursed out of such surplus for amounts paid at a sale of the same land to it for nonpayment of assessments levied against the land to pay for local improvements.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

At the time of the filing of the original bill in this cause, November 9, 1912, Isaac C. Ogden was and had been for more than twenty-five years the owner in fee simple of five certain lots in Cook county, Illinois. The bill was filed by the People, etc., under and by virtue of section 253 of the Revenue Act (J. & A. ¶ 9472), to foreclose the liens for certain unpaid taxes levied upon said lots and other property. Isaac C. Ogden, the City of Chicago and others were made parties defendant. Various proceedings were had and on March 19, 1913, a decree of sale was entered wherein it was ordered that William L. O'Connell, county treasurer and *ex officio* county collector of said Cook county, should sell said lots, with other property, to satisfy said tax liens, and that unless said lots were redeemed within two years from said sale according to law the defendants and all persons claiming under them should be forever foreclosed of all further

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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claim or right in the lots, and the county clerk should then issue a deed or deeds to the legal holders of the certificates of sale, etc. In pursuance of the decree the county treasurer duly offered for sale and did sell said lots on April 23, 1913, and, on May 17, 1913, filed his report of sale and the same was approved by the court. The report showed that at said sale the lots sold for an amount more than sufficient to pay all moneys due under the decree, together with costs, and that there remained in the hands of the county treasurer, out of the proceeds of the sale of said lots, a surplus of \$1,252.25, to be distributed and paid as the Circuit Court should direct.

After the entry of said decree of sale, and after said sale, to wit, on or about October 9, 1913, Isaac C. Ogden (the owner of the lots at the time of said sale) and one Joseph Rushkewicz entered into an agreement for the sale by Ogden to Rushkewicz of said lots and for an assignment by Ogden to Rushkewicz of said surplus in the hands of the county treasurer. Pursuant to said agreement Ogden and wife, by quitclaim deed, dated October 9, 1913, and recorded October 14, 1913, conveyed said lots to Rushkewicz, and at the same time assigned all of Ogden's right, title and interest in and to said surplus to Rushkewicz. Thereafter, on October 14, 1913, Rushkewicz by an instrument in writing duly assigned to Hiram Coombs all of his (Rushkewicz') right, title and interest in and to said surplus.

Subsequently, on October 27, 1913, Hiram Coombs filed his petition, entitled in said original cause, *People, etc., v. Isaac C. Ogden et al.*, in said Circuit Court, making all of the defendants in said original cause, and also said Joseph Rushkewicz, parties defendant to his petition, and setting up the above mentioned facts, and praying that the court enter an order directing the county treasurer to pay over said surplus of \$1,252.25 to him (Coombs). Rushkewicz and Ogden filed answers admitting the allegations of the petition to be

true and making no objections to the court entering an order in accordance with the prayer of the petition. The People, etc., and William L. O'Connell, county treasurer, filed a joint and several answer in which they admitted that such a surplus, amounting to \$1,252.25, was in the hands of the county treasurer, and disclaimed all right or interest therein, and alleged that said county treasurer held the same for the benefit of such person or persons as should appear entitled thereto and subject to the order of the Circuit Court. The City of Chicago filed an answer in which it denied that the petitioner (Coombs) was entitled to said surplus, and alleged that "it has a first and prior *lien on said surplus money* by virtue of certain special assessments levied pursuant to law for public improvements affecting the said property in said petition described, and that said assessments so levied were unpaid and that the *amount of unpaid assessments* now due the said City of Chicago amounts to the sum of \$1,000, and that the said property *was sold* to this defendant in pursuance of the said statute in such case made and provided as shown by the records of the Recorder of Deeds of Cook County, Illinois, and said defendant stands ready to produce said special assessment records, together with all certificates and *tax deeds* pertaining to the same." The city in its answer prayed that the petition of Coombs be dismissed and that the court enter an order directing the county treasurer out of said surplus money to pay to the city the sum due to it "under and by virtue of its *liens* hereinabove described for unpaid special assessments."

On November 6, 1913, the court ordered that said petition together with all answers and pleadings thereto be referred to a master in chancery to take proofs and report the same together with his conclusions thereon. On the hearing before the master, after the petitioner Coombs had introduced his evidence and had rested his case, the city offered in evidence cer-

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tain purported tax deeds of the property to it. Upon objections being made thereto, the solicitor for the city stated: "The purpose of the offer is *not for the purpose of indicating an adverse title*; it is merely to indicate that the City of Chicago has pursued the taxes to such an extent as the statute permits them to pursue it for the purpose of protecting their lien acquired under the judgment in the county court, in confirmation of a special assessment; * * * *we do not want to prove title by the tax deed.*" On January 23, 1914, the master made a report in which he stated that "no claim is made by the City of Chicago to said surplus by reason of the sale to it of the premises in question for unpaid taxes and the subsequent issuance to it of tax deeds thereon; nor were said tax deeds offered for the purpose of showing a title adverse to that of petitioner's assignor (Rushkewicz), but to evidence merely that the city had pursued one of the methods specifically given it by statute to enforce its right to reimbursement for improvements made," and in which he expressed the opinion that the petitioner (Coombs) was entitled to the relief prayed for, and recommended that the court enter an order directing the county treasurer to pay said surplus in his hands to said petitioner. Before said report was filed in the Circuit Court the City of Chicago, on January 30, 1914, applied for leave to file *instantly* an amendment to its answer to the petition of Coombs. Such leave was granted and the amendment filed, and the same was referred to said master to hear evidence and report his conclusions of law and fact at the same time he made his report on said petition and the original answer of the city thereto. In said amendment the city alleged that the petitioner (Coombs) was not entitled to said surplus because the city "is and for a considerable time has been the *owner of the premises* out of which it is claimed said surplus arose," and the city prayed that "if any order or decree is entered dis-

tributing said surplus, that said decree provide that it be paid to this defendant, but that if the court should decree that for any reason said Coombs is entitled to the surplus, then said decree should provide that there first be paid out of said surplus *the amount paid out by the city at certain tax sales* at which it bought in the property in question in default of other bidders, together with the interest on said amount and the costs of this defendant, *amounting in all to the sum of \$908.95.*" On February 28, 1914, the master made a supplementary report in which he stated that in his opinion "the filing by the City of Chicago of its amended answer herein does not in any way alter or change the city's status in said proceeding or effect the findings and conclusions contained in the master's original report herein, and he therefore recommends that the prayer of the petition of Hiram Coombs be granted and that a decree or order in conformity therewith be entered." It appears from the supplemental report that after the second order of reference, entered January 30, 1914, further evidence was heard before the master. It further appears that on this hearing it was agreed between the petitioner and the City of Chicago that "*the city makes no claim in this suit as to the title in it to any of the property in evidence, and that the master need make no report thereon.*" Objections by the city to the original and supplemental reports were filed and overruled. Both the original and supplemental reports were filed in the Circuit Court on March 16, 1914, and on that date the Circuit Court, after overruling exceptions thereto, approved said reports and entered a final order or decree directing the payment of said surplus to the petitioner, Coombs, and that the master's fees and costs be paid by the City of Chicago. By this appeal the City of Chicago seeks to reverse said order or decree.

JOHN W. BECKWITH, for appellant; CHARLES M. HAFT and WILLIAM J. NAUGHTON, of counsel.

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ROBERT ZALESKI, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

It is contended by counsel for the City of Chicago that the decree should be reversed because it is in violation of section 72 (as amended) of the "Act concerning Local Improvements," in force July 1, 1897. (J. & A. ¶ 1463.) Section 72, prior to its being amended, provided that:

"Any city, village or town interested in the collection of any tax or special assessment, may, in default of other bidders, become a purchaser at any sale of property to enforce the collection of the same, and may, by ordinance, authorize and make it the duty of one or more municipal officers to attend such sales and bid thereat in behalf of the corporation."

By an Act approved June 28, 1913, in force July 1, 1913, said section 72 was amended by adding the following:

"Any municipal corporation which holds any certificate of sale or tax deed acquired in pursuance hereof shall be entitled to reimbursement of the amount paid by it at such sale, including the cost and interest at the rate of five per cent (5%); and no final judgment or decree shall be entered in any case either at law or in equity or in proceedings under the eminent domain act involving the title to or interest on any land in which such municipal corporation shall be a party, until reimbursement has been made to it as herein provided."

Counsel for the city argue that by reason of the provisions contained in said amendment to said section the court should not have entered a decree giving said surplus in the county treasurer's hands to the petitioner, Coombs, until said petitioner had reimbursed the city for its expenditures, including costs and interest, at the sales of the property in question for special assessments in default of other bidders. We think it

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is a sufficient answer to the contention to say that, subsequent to the filing of counsel's brief in this court, our Supreme Court has declared that portion of section 72 as amended in 1913 to be unconstitutional. *City of Chicago v. Gage*, 268 Ill. 232, 243.

It is also contended by counsel that the decree should be reversed because it is in violation of the provision contained in section 224 of chapter 120 of the Revised Statutes of Illinois (J. & A. ¶ 9443), as follows:

“That any judgment or decree of court, *setting aside any tax deed* procured under this act, shall provide that the claimant shall pay to the party holding such tax deed all taxes and legal costs, together with all penalties, as provided by law, as it shall appear the holder of such deed, or his assignors, shall have properly paid or be entitled to in procuring such deed, before such claimant shall have the benefits of such judgment or decree.”

We cannot agree with the contention. The order or decree appealed from does not set aside any tax deed. It has several times been decided by our Supreme Court that a tax title holder, by virtue of said provision in section 224, is entitled to be reimbursed *only* when the tax title is set aside. *Riverside Co. v. Townshend*, 120 Ill. 9; *Gage v. Eddy*, 186 Ill. 432; *City of Chicago v. Pick*, 251 Ill. 594, 600. Furthermore, as we view it, the admission on the hearing that “the city makes no claim in this suit as to the title in it of any of the property in evidence” amounted in effect to an admission that its tax deeds were not valid, and it has also been decided that the holder of an invalid tax deed is not entitled to reimbursement for the amount of money expended in acquiring the tax title (*City of Chicago v. Pick*, *supra*; *O'Connell v. Sanford*, 255 Ill. 49; *South Park Com'rs v. Berg*, 259 Ill. 447); and that this rule applies where a city is the holder of such a tax deed as well as where the holder is an individual (*O'Connell v. Sanford*, 256 Ill. 62).

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And we do not think there is any merit in the contention that the petitioner, Coombs, having no greater rights than Ogden, is estopped to claim that the city is not entitled to be paid out of said surplus the amount it expended in procuring said tax deeds, or in the further contention that the decree in effect violates the law that a man cannot take advantage of his own wrong.

We are of the opinion that the decree of the Circuit Court should be affirmed.

Affirmed.

Frank P. Illsley, Appellee, v. Peerless Motor Car Company, Appellant.

Gen. No. 21,006. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed on remittitur. Opinion filed December 21, 1915.

Statement of the Case.

Action by Frank P. Illsley, plaintiff, against the Peerless Motor Car Company, defendant, in the Circuit Court of Cook county, to recover "commissions" alleged to be due under a written contract by which defendant made plaintiff its agent for the sale of its motor cars. From a judgment for plaintiff for \$1,985, defendant appeals.

By the terms of said written contract plaintiff was made the "exclusive agent" of defendant until November 1, 1904, for the sale of its motor cars "in the territory included in State of Illinois north of a line drawn east and west through the City of Vandalia, Ill., to a

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line east and west located 125 miles north and east of Chicago, with the exception of the City of Milwaukee, Wis., and State of Iowa east of a line drawn north and south through Des Moines.” Plaintiff, in consideration of his appointment as such agent, agreed, among other things, to do all local advertising and conduct all local shows and exhibits at his own expense; to maintain proper sales rooms and repair and storage rooms at Chicago, Illinois; to carry in stock at all times at least one of the defendant’s cars for demonstrating purposes and one or more new cars for sale, together with reasonable supplies for repairs; and to order from defendant not less than twenty-five, 4 cylinder, 24 horse-power cars, to be delivered at stated times during a period of eight months from the date of the contract. Plaintiff was to be allowed a discount of twenty per cent. from defendant’s list prices, as fixed from time to time, on all cars purchased from defendant. Plaintiff further agreed to devote his best energies to the sale of defendant’s products, to refer promptly to defendant all inquiries received from territory other than his own, and not to sell or deliver any of defendant’s products in any territory other than his own except by defendant’s permission in writing, and plaintiff further agreed that neither he nor any one for him should sell defendant’s products at a price less than the list price at the time of such sale.

Plaintiff claimed that on January 19, 1904, while said contract was in force, defendant, either directly or through its agent at the City of Milwaukee, accepted an order for the sale and delivery of one of its automobiles or cars to Frank K. Bull, residing at Racine, Wisconsin (within plaintiff’s exclusive territory), at the list price of \$6,445, including certain extras, and that subsequently and while said contract was in force defendant sold and delivered said car to said Bull at said price at Milwaukee without plaintiff’s

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consent; that about December 1, 1903, while said contract was in force, defendant without plaintiff's consent sold at Chicago, Illinois (within plaintiff's said territory), another of its cars to A. C. Banker, residing in Chicago, for the price of \$3,750; and that by reason of said two sales plaintiff became entitled to "commissions upon said sales of twenty per cent. of the sums of money received for the same," which "commissions" defendant had refused to pay plaintiff. The award of the jury on the first trial, viz., \$2,039, is twenty per cent. of the aggregate amount of both of said sales.

The case was here before (177 Ill. App. 459), and after the cause had been redocketed in the Circuit Court, plaintiff, by leave of court, on March 11, 1914, filed an additional count to his declaration, which was similar to the special count originally filed except that it contained the further allegation that "there existed in the automobile trade at the time when said contract was entered into a certain uniform trade custom and usage, which entered into the aforesaid agreement, that an exclusive agent was entitled to commissions on all cars disposed of by the defendant either by itself or any other agent of the defendant within the territory in said contract described." To this additional count defendant filed a plea of the general issue, and two special pleas to the effect that the supposed cause of action did not accrue to the plaintiff (a) within ten years or (b) within five years next before the filing of said additional count. To these special pleas plaintiff filed general demurrers and the demurrers were sustained.

The substantial facts regarding the Bull transaction are stated in the former opinion of this court (177 Ill. App., p. 462) and need not be repeated.

As to the transaction with Banker, the evidence disclosed that he was the sales agent of defendant prior to the appointment of plaintiff; that upon the termina-

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tion of his agency Banker asserted a claim against defendant for damages because of his alleged wrongful dismissal and for a credit balance due him; and that this claim was finally settled by the delivery to him by defendant of a car, the list price of which was \$3,750. While it appears that plaintiff complained to defendant that the delivery of a car to Banker would be detrimental to plaintiff's business, there is a sharp conflict in the evidence as to whether or not plaintiff did not finally assent to such delivery; and plaintiff testified: "I did not canvass Mr. Banker or attempt to sell him a car. I do not think I could have sold a car to Banker; * * * he was not a prospective customer in any way."

MONTGOMERY, HART, SMITH & STEERE, for appellant.

H. F. DICKINSON, for appellee.

W. H. TATGE, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. CONTRACTS, § 387*—*when evidence insufficient to establish breach of contract.* In an action to recover on a contract where defendant agreed that plaintiff should have an exclusive right to sell its motor cars within a named territory and should have as his compensation for such sales an agreed discount from defendant's listed price therefor, and the breach relied on to sustain the action was that the defendant directly or indirectly sold one of its cars within plaintiff's territory, evidence *held* sufficient to support a finding that plaintiff could not have made the sale, and that he did not sustain any actual damages as a result of such sale.

2. CONTRACTS, § 387*—*when evidence sufficient to establish breach of contract.* In an action to recover on a contract whereby defendant agreed that plaintiff should have the exclusive right to sell its motor cars within a named territory and should have as his compensation for such sales an agreed discount from defendant's listed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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price therefor, where the breach relied on to sustain the action was that defendant directly or indirectly sold one of such cars within plaintiff's territory, evidence *held* to warrant a finding that plaintiff could have made the sale, and that plaintiff suffered substantial damages.

3. INTEREST, § 56*—*how should be computed upon breach of contract.* In an action to recover on a contract whereby defendant agreed that plaintiff should have the exclusive right to sell its cars within a named territory, and should have as his compensation an agreed discount on defendant's listed price for cars sold by plaintiff, and where judgment for plaintiff included the amount of such discount on the price obtained for a car sold by defendant within such territory in breach of the contract, *held* that interest should be computed on the amount of the discount from the date of such sale.

4. INTEREST, § 81*—*when error exists in computation of interest.* In an action to recover on a contract whereby defendant agreed that plaintiff should have the sole right to sell its motor cars within a named district, a judgment for plaintiff of \$1,921.83, *held* excessive to the extent of \$63.17.

A. E. Bond and O. J. Bond, trading as Ideal Spinning Company, Appellees, v. Duntley Manufacturing Company, Appellant.

Gen. No. 21,014. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed on remittitur. Opinion filed December 21, 1915. Rehearing denied December 30, 1915.

, Statement of the Case.

Action by A. E. Bond and O. J. Bond, copartners, trading under the name of Ideal Spinning Company, plaintiffs, against the Duntley Manufacturing Company, a corporation, defendant, in the Municipal Court

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of Chicago, in an action of the first class, to recover on a contract. From a judgment for plaintiffs for \$2,428.83, defendant appeals.

MONTGOMERY, HART, SMITH & STEERE, for appellant.

CARL A. WALDRON, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 13*—*what practice includes*. Pleadings are included within the term "practice."

2. MUNICIPAL COURT OF CHICAGO, § 5*—*what power judges have to make rules*. Under paragraph 9 of section 28 of the Municipal Court Act (J. & A. ¶ 3340), the judges of the Municipal Court of Chicago may adopt a rule providing for the filing of a statement of claim, instead of a declaration, in cases of the first class.

3. MUNICIPAL COURT OF CHICAGO, § 17b*—*when motion for dismissal of action properly refused*. In an action of contract of the first class in the Municipal Court of Chicago, the denial of a motion to dismiss *held* not erroneous because plaintiffs filed a statement of claim instead of a declaration, where it appeared that such pleading was permitted by a rule of that court in force when such statement of claim was filed.

4. ATTORNEY AND CLIENT, § 67*—*when evidence of admission by attorney admissible*. Where the settlement of a controversy is delegated to the attorney of one of the parties with general authority to settle the same, an admission by him made during negotiations looking to such settlement is not incompetent as violating the rule that an attorney cannot, outside a trial, make admissions against the interest of a client, for the reason that the law of principal and agent is applicable to the relation of attorney and client, and the client is bound by the acts of his attorney within the scope of the authority of such attorney.

5. ATTORNEY AND CLIENT, § 67*—*when client bound by admission of attorney*. A client which has delegated to its general counsel general authority to settle a controversy is bound by the admission of an attorney in the office of such general counsel, to whom the settlement of such controversy has been delegated with the consent of the client, as much as though such admission were made by such

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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general counsel, especially where it appears that the client acquiesced in and subsequently ratified the acts of such attorney with reference to such controversy.

6. CONTRACTS, § 298*—*when tender of performance insufficient.* An offer to ship goods on condition that defendant pay for them in advance of shipment is not a sufficient tender of performance under a contract providing for shipment on condition of payment "in thirty days from delivery."

7. CONTRACTS, § 294*—*when performance or willingness to perform conditions precedent to recovery.* An action upon a contract cannot be maintained unless plaintiffs proved performance on their own part, or that they were ready and willing to perform within the time limited by the contract.

8. CONTRACTS, § 387*—*when evidence insufficient to establish excuse for tender of performance.* In an action to recover for breach of a contract to manufacture and deliver goods, where there was no sufficient tender of performance by plaintiffs, evidence *held* insufficient to excuse plaintiffs from making tender of performance.

9. CONTRACTS, § 294*—*what is essential to authorize recovery on contract.* No recovery can be had in an action to recover for the purchase price of goods which plaintiffs contracted to manufacture and deliver to defendant where there is neither a sufficient tender of performance by plaintiffs nor a state of facts excusing tender.

10. CONTRACTS, § 294*—*when there can be no recovery for expense of storing and insuring undelivered goods.* In an action to recover the purchase price of goods which plaintiffs contracted to manufacture and to deliver to defendant, no recovery can be had for expenditures for storing and insuring goods not delivered in the absence of a sufficient tender of performance by plaintiffs, or of a state of facts excusing such tender.

City of Chicago, Defendant in Error, v. William Wright, Plaintiff in Error.

Gen. No. 21,036. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES N. GOODNOW, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed December 21, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Peters v. Reddy et al., 195 Ill. App. 579.

Statement of the Case.

Prosecution by the City of Chicago against William Wright, defendant, in the Municipal Court of Chicago, charging defendant with committing "an indecent, lewd and filthy act," with uttering "lewd, indecent and filthy words" and with making "obscene gestures publicly" in violation of section 2026 of the Revised Municipal Code of Chicago. To reverse a judgment of conviction, defendant prosecutes this writ of error.

GENTZEL & CRANE and WILLIAM H. GRUVER, for plaintiff in error.

JOHN W. BECKWITH and ALBERT J. W. APPELL, for defendant in error.

JOHN F. POWER, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

LEWDNESS—*when admission of evidence error.* In a prosecution wherein defendant was charged with uttering indecent words and with making obscene gestures publicly, in violation of an ordinance, the admission of evidence that defendant had used indecent language *held* prejudicial, where it appeared that the indecent language testified to was not used in the presence of the complaining witness.

Maria Peters, Defendant in Error, v. John A. Reddy and Fanny Reddy, Plaintiffs in Error.

Gen. No. 21,044. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed December 21, 1915. Rehearing denied January 4, 1916.

Wood v. Foster, 195 Ill. App. 580.

Statement of the Case.

Action by Maria Peters, plaintiff, against John A. Reddy and Fanny Reddy, defendants, in the Municipal Court of Chicago, to recover on a promissory note. To reverse a judgment for plaintiff, defendants prosecute this writ of error.

KING, BROWER & HURLBUT, for plaintiffs in error.

JOHN LACE, for defendant in error; RANKIN & DUNN and ODE L. RANKIN, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 440*—*when evidence sufficient to sustain judgment.* In an action to recover on a promissory note, judgment for plaintiff *held* sustained by the evidence as against defendants' claim of want of consideration.

Charles L. Wood, Plaintiff in Error, v. Minnie N. Foster, Defendant in Error.

Gen. No. 21,071. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JACOB H. HOPKINS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

Action by Charles L. Wood, plaintiff, against Minnie N. Foster, defendant, in the Municipal Court of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Wood v. Foster, 195 Ill. App. 580.

Chicago, to recover the amount of a broker's commission for negotiating the sale of certain real estate. To reverse a judgment for defendant, plaintiff prosecutes this writ of error.

This case has been tried twice. On the first trial the court directed the jury to return a verdict in favor of the defendant, Minnie N. Foster, which they did, and judgment was entered on the verdict against the plaintiff. On June 24, 1913, this court reversed said judgment and remanded the cause on the ground that the trial court erred in directing a verdict for the defendant. (*Wood v. Foster*, 181 Ill. App. 409.) When the case came on for trial the second time the defendant withdrew her request for a jury trial, and the case was tried before the court upon the same evidence as was introduced at the first trial. It was stipulated that the transcript of the record and the printed abstract thereof filed in this court on the former appeal be introduced in evidence without objections or exceptions by either party. The court found the issues against the plaintiff and on October 2, 1914, entered judgment against the plaintiff for costs. The issues made by the pleadings and the evidence in the case are sufficiently stated in the former opinion of this court.

E. F. MASTERSON, for plaintiff in error.

M. F. GALLAGHER, for defendant in error; E. B. WILKINSON, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 88***—*when evidence sufficient to sustain verdict in action for commissions.* In an action to recover the amount of a broker's commission for negotiating the sale of certain real estate, judgment against plaintiff *held* not manifestly against the weight of evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. MUNICIPAL COURT OF CHICAGO, § 17a*—*when propositions presented properly refused.* Propositions submitted to be held by the trial court, marked "propositions of law and fact," but which are neither propositions of law nor propositions of fact but mixed propositions of law and fact, are properly refused.

**City of Chicago, Defendant in Error, v. John Doe,
alias Dave Smith, Plaintiff in Error.**

Gen. No. 21,088. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. NEWCOMER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

Prosecution by the City of Chicago against John Doe, *alias* Dave Smith, defendant, in the Municipal Court of Chicago, charging defendant with the violation of an ordinance. To reverse a judgment of conviction with a fine of two hundred dollars, defendant prosecutes this writ of error.

The amended complaint of W. J. Hoffman, signed, sworn to and filed on October 22, 1914, alleged that John Doe, *alias* Dave Smith, on September 19, 1914, at the City of Chicago, "was then and there the keeper of a certain common, ill-governed and disorderly house, then and there kept for the encouragement of idleness, gaming, drinking, fornication, and other misbehavior, then and there located at 515 N. La Salle St., in the City of Chicago, in violation of section 2019 of the Revised Municipal Code of Chicago." Prior to the trial the defendant moved to quash and strike said complaint from the files, which motion was denied. The jury returned a verdict finding the defendant "guilty

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of a violation of the ordinance, described in the complaint herein, known as section 2019," and assessing a fine against him of two hundred dollars. After overruling motions for a new trial and in arrest of judgment, the court entered judgment upon the verdict against defendant for two hundred dollars and costs, which judgment the defendant by this writ seeks to reverse.

While it does not appear from the transcript that said section 2019 was formally introduced in evidence before the jury, it does appear that the court in the oral charge to the jury stated that "the ordinance under which the city is proceeding in this case reads as follows: 'Every common, ill-governed or disorderly house, room or other premises, kept for the encouragement of idleness, gaming, drinking, fornication or other misbehavior, is hereby declared to be a public nuisance, and the keeper and all persons connected with the maintenance thereof, and all persons patronizing or frequenting the same, shall be fined not exceeding two hundred dollars for each offense.'"

M. A. ZELENSKY, for plaintiff in error.

JOHN W. BECKWITH and A. J. W. APPELL, for defendant in error.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL COURT OF CHICAGO, § 36*—*when presumed that court took judicial notice of ordinance.* In a prosecution in the Municipal Court of Chicago, charging defendant with the violation of an ordinance of the City of Chicago, a judgment of conviction *held* not erroneous although it did not appear that the ordinance alleged to have been violated was formally offered in evidence, for the reason that under section 54 of the Municipal Court Act (J. & A. ¶ 3371),

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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requiring such court to take judicial notice of all general ordinances of such city, it is to be presumed that judicial notice was taken of the ordinance alleged to have been violated.

2. **MUNICIPAL COURT OF CHICAGO, § 36***—*when presumed that court correctly stated provisions of ordinance.* In a prosecution in the Municipal Court of Chicago, charging defendant with a violation of an ordinance of the City of Chicago, it is to be presumed that the court correctly stated the provisions of the ordinance alleged to have been violated, where it appears that in an oral charge the court told the jury what were the provisions of such ordinance.

3. **DISORDERLY HOUSE, § 1***—*when remedy to make complaint more specific.* In a prosecution in the Municipal Court of Chicago, charging defendant with keeping a disorderly house in violation of an ordinance, a motion to quash the complaint *held* properly denied, for the reason that in case the complaint was not sufficiently specific defendant's remedy is in a motion for a more specific statement of the offense charged and not by a motion to quash.

4. **DISORDERLY HOUSE, § 6***—*when judgment of conviction sustained by evidence.* In a prosecution charging defendant with keeping a disorderly house in violation of an ordinance, a judgment of conviction *held* not against the weight of the evidence.

5. **DISORDERLY HOUSE, § 7***—*when charge not prejudicially erroneous.* In a prosecution charging defendant with keeping a disorderly house in violation of an ordinance, where certain portions of an oral charge were assigned as error, the whole charge as an entirety *held* not prejudicially erroneous.

M. Goldstein, Defendant in Error, v. Paul Setka and Anna Setka, Plaintiffs in Error.

Gen. No. 21,105. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

Action by M. Goldstein, plaintiff, against Paul Setka and Anna Setka, defendants, in the Municipal Court

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of Chicago, to recover the amount of a broker's commission for negotiating the sale of certain real estate. To reverse a judgment for plaintiff for \$337.50, defendants prosecute this writ of error.

The plaintiff, M. Goldstein, on October 29, 1913, filed his statement of claim to recover commissions as a real estate broker. The defendants entered their appearance and demanded a jury trial. Subsequently plaintiff filed an amended statement of claim in which he alleged, in substance, that his claim was for commissions due him as a licensed real estate broker for procuring at defendants' request a purchaser, one S. Oliff, for certain real estate with improvements thereon owned by defendants and situated in the City of Chicago; that the property was sold by the defendants to said Oliff on June 23, 1913, for the sum of \$13,500; and that the amount due plaintiff as commissions was two and one-half per cent. on said sum, or \$337.50. The defendants in their affidavit of merits alleged, in substance, that they did not employ plaintiff as a broker or otherwise with reference to said sale and that plaintiff did not act as agent for defendants but as agent for said Oliff in the transaction. The jury returned a verdict finding the issues against the defendants and assessing plaintiff's damages at \$337.50, upon which verdict the court entered the judgment here sought to be reversed.

The evidence showed that plaintiff was a duly licensed real estate broker, that defendants owned the property and that plaintiff carried on negotiations with Oliff with the knowledge of defendants which resulted in the sale.

It appeared that as a result of the efforts and negotiations of plaintiff the parties were brought together and signed a written contract whereby defendants agreed to sell and Oliff to buy the property for \$14,000; that subsequently further negotiations were had which resulted in the price being reduced to \$13,500; that

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there was no special agreement between plaintiff and defendants as to the commissions to be received by plaintiff, but that those commissions were usually two and a half per cent. on the purchase price.

GEORGE H. MASON, for plaintiff in error.

Q. J. CHOTT, for defendant in error; FRANK H. CULVER, of counsel.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 88*—*when evidence sufficient to sustain judgment.* In an action to recover the amount of a broker's commission for negotiating the sale of certain real estate, judgment for plaintiff held warranted by the evidence.

2. BROKERS, § 62*—*when broker acting for both parties entitled to commissions.* Where it appears that through the efforts of a licensed real estate broker the owners and purchaser of real estate were brought together and a contract made for the sale of the real estate, a contract may be implied by which such owners agreed to pay such broker a commission for negotiating such sale, although such broker was never formally employed as broker by such owners, and although it appears that such broker was also acting as agent for the purchaser of such real estate in the same transaction, provided such owners knew of such employment by such purchaser, and provided no fraud was practiced by such broker on such owners.

3. BROKERS, § 38*—*when broker presenting purchaser entitled to commissions.* When a broker has presented to his principal a purchaser whom the principal is willing to accept and does accept, and such purchaser and principal enter into a contract of sale, the broker's commissions are earned.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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George M. Mayr, Appellee, v. Nelson Chesman & Company, Appellant.

Gen. No. 21,784.

1. FRAUD, § 72*—*when bill sufficiently alleges.* In a bill praying an accounting on the ground of fraud, averments of the bill held sufficient to show fraud.

2. ACCOUNT, § 19*—*when equity jurisdiction of bill for accounting.* In a bill praying an accounting where evidence was taken by a master on complainant's motion for a preliminary injunction, bill and evidence held to show that the accounts in question are numerous and complicated sufficiently to give jurisdiction thereof to a court of equity.

3. ACCOUNT, § 19*—*when equity jurisdiction of bill of accounting.* Courts of equity have jurisdiction to compel an accounting, although there be an adequate remedy at law, where fiduciary relations exist between the parties, or where fraud is charged or where discovery is sought.

4. FRAUD, § 55*—*when equity jurisdiction on ground of fraud.* Fraud is one of the broadest grounds giving jurisdiction to a court of equity, and where fraud exists the aggrieved party is not bound to resort to another tribunal, possessed of less power and appliances to ascertain the truth and grant relief, although another tribunal may also have jurisdiction.

5. ACCOUNT, § 19*—*when equity jurisdiction of bill for accounting.* The conditions usually held sufficient to give a court of equity jurisdiction to entertain a bill for an accounting are where the accounts in question are complicated or intricate, or are involved with third parties, or where the methods of investigation peculiar to a court of equity are needed, or where it would be difficult for a jury to unravel the numerous transactions involved.

6. ACCOUNT, § 19*—*when equity jurisdiction of bill for accounting.* The jurisdiction of a court of equity to entertain a bill for an accounting depends not on the absence of any remedy at law, but upon the adequacy and practicability of such remedy and upon the discretion of the court.

7. ACCOUNT, § 19*—*when equity will exercise concurrent jurisdiction of bill for accounting.* In regard to questions of accounts, the jurisdiction of courts of equity is concurrent with that of courts of law, and no precise rule can be laid down as to when a court of equity will exercise such jurisdiction, such court reserving to itself a large discretion, and refusing to take such jurisdiction according to the circumstances of the particular case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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8. INJUNCTION, § 16*—*when equity will enjoin suit at law.* Where a bill prays an accounting and it appears that at the time the bill is filed an action is pending at law involving the matters in regard to which the accounting is sought, an interlocutory decree restraining the further prosecution of such action at law is proper, for the reason that such an injunction is warranted when for any reason a court of equity is a more suitable tribunal for the determination of the matter, or where equitable remedies, unavailable at law, are required.

9. ACCOUNT, § 19*—*when equity jurisdiction of bill for accounting.* Where a bill prays an accounting, and it appears that when the bill was filed an action at law was pending involving the matters as to which the bill prays an accounting, the fact that under section 68 of the Practice act (J. & A. § 8605), relating to matters of accounts, and Hurd's Rev. St., ch. 51, sec. 9 (J. & A. § 5526), relating to the production of books and writings, a court of law has every facility possessed by a court of equity for the conduct of an accounting, does not operate to oust the long recognized jurisdiction of a court of equity in matters of account.

10. ACCOUNT, § 26*—*when bill for accounting not fatally defective.* A bill praying an accounting is not fatally defective in that complainant made no demand for such accounting before filing his bill.

11. ACCOUNT STATED, § 1*—*what constitutes.* The terms "stated" and "settled" accounts are sometimes used as equivalent expressions.

12. ACCOUNT, § 19*—*when equity will entertain bill to open up stated account.* An account stated is only prima facie evidence of its correctness, so that if the balance ascertained be tainted with fraud or mistake, or is brought about by undue advantage, equity will entertain a bill for the purpose of opening it for restatement or correction in part.

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1915. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

This is an appeal from an interlocutory order or decree of the Superior Court of Cook county, entered July 23, 1915, wherein Nelson Chesman & Company, a corporation, its agents and attorneys, were, until the further order of the court, restrained from further prosecuting its certain pending suit in the Municipal

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Court of Chicago against the complainant, George H. Mayr, and also restrained from commencing any further suits against said complainant growing out of the transactions mentioned in complainant's bill of complaint.

The bill was filed March 18, 1915, and was verified by the affidavit of complainant. It is therein alleged, in substance, that complainant has been engaged in the drug business in Chicago, Illinois, for the past twenty-five years, and is and has been for many years the owner of a medical preparation known as "Mayr's Wonderful Stomach Remedy"; that the defendant Nelson Chesman & Company is a Missouri corporation, duly licensed to do business in Illinois and having an office in Chicago, Illinois, and is and has been for several years past engaged in business as a general advertising agency, and as such solicits advertisements from advertisers, which it causes to be placed in newspapers, magazines and periodicals throughout the United States for compensation paid it; that for several years prior to August 1, 1913, complainant sold his said remedy through druggists in various towns in the United States by advertising said remedy over the respective names of said druggists, which class of advertising is hereinafter referred to as "drug store advertising"; that shortly before August 1, 1913, complainant entered into negotiations with defendant which on said date resulted in an agreement in writing between them, which agreement provided that, in consideration of complainant placing his newspaper and magazine advertising through defendant's agency, defendant would give complainant the benefit of the lowest possible net rates obtainable by defendant from publishers and charge complainant ten per cent. over said lowest net rates; that the defendant was to make for complainant the best contracts possible with the publishers and give complainant the benefit of all discounts for time or space that the publishers allowed

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defendant; that defendant was to bill complainant on the first of each and every month for daily and weekly papers for insertions of the previous month and for monthly publications of the current month; that defendant would allow complainant a cash discount for the prompt payment of his bills on the same date that said publishers allowed such a discount to defendant; that said agreement was to be in force for a period of one year from its date, with the privilege of extension from year to year unless written notice was given within thirty days before the expiration of the same, and that said agreement was in full force up to and including December 12, 1914; that prior to August 1, 1913, complainant, in addition to said drug store advertising, sold and distributed his said remedy through advertising by a plan hereinafter referred to as the "mail order plan," viz., by advertising said remedy over the name and address of complainant and distributing and selling the same directly to the consumer through the mails, but that about August 1, 1913, said mail order plan was almost wholly abandoned; that subsequent to the making of the said written agreement of August 1, 1913, defendant endeavored to induce complainant to resume his said mail order plan of advertising, and certain negotiations were had which resulted, on or about September 10, 1913, in complainant entering into another agreement with defendant; that said other agreement provided that complainant was to resume his mail order plan of advertising and place such advertising with defendant, and that defendant would guaranty that the net amount of money received as the result of this class of advertising would pay the cost thereof and that defendant would reimburse complainant for any deficit that might exist; and that after September 10, 1913, and up to the month of December, 1914, both said drug store advertising agreement and said mail order advertising agreement were in full force.

It is further alleged in the bill, in substance, that in pursuance of said agreements the defendant prepared advertisements and placed them in various newspapers and periodicals; that defendant agreed to pay the various publishers for the same and to secure repayment from complainant upon presenting to him its bills therefor, together with a commission of ten per cent. added for placing said advertisements; that complainant's advertisements were published hundreds of times in more than six hundred publications throughout the United States; that complainant has spent for that purpose through the defendant, since August 1, 1913, approximately \$150,000; that all contracts for the publication of complainant's advertisements were made by the defendant with the various publishers, and that the only information which complainant has had with reference to such contracts is such as furnished him by defendant, and that the only knowledge complainant has had as to the charges made by said publishers for said advertisements is likewise such as furnished him by defendant; that each month defendant rendered to complainant bills for advertising theretofore published, and that each of said bills purported to set forth truthfully the exact amount of space used in each publication for complainant's advertisements, the exact time the same were published and the exact charge made by each publisher; that complainant had implicit confidence in defendant, and trusted defendant, and accepted as true the statements contained in said bills, and upon that basis paid defendant thousands of dollars, and paid all bills rendered by defendant except bills rendered since and including December 12, 1914; that on or about said date complainant terminated his relations with defendant "because of facts coming to his knowledge leading him to believe that defendant had practiced fraud and deception on him, as hereinafter set forth."

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It is further alleged in the bill, in substance, that complainant thereupon checked up some of the bills theretofore rendered by defendant and paid by complainant; that said bills did not truthfully set forth the exact amount of space used in each publication for complainant's said advertisements, and did not truthfully set forth the amount paid to the publishers by the defendant; that many of the items charged in said bills were false and fictitious; that advertising space had been charged to and paid by complainant at rates greatly in excess of the rates charged to the defendant by the publishers, and that defendant had fraudulently charged complainant for space in excess of the space used by complainant in such publications; that on numerous occasions the defendant was allowed by the publishers a certain discount, ranging from two to five per cent. for the cash payment of their bills, and complainant paid the bills rendered by defendant within the time necessary to obtain such discounts, but defendant contrary to the provisions of said written contract did not allow complainant such discounts, and complainant paid the bills as rendered without such discounts, having no knowledge at the time that defendant had obtained the same from said publishers, and complainant alleges, upon information and belief, that defendant fraudulently appropriated such discounts to its own use; that defendant did not endeavor to procure for complainant from said publishers the best rates obtainable, but on the contrary in numerous instances paid said publishers their highest rates and charged the same to complainant for the fraudulent purpose of increasing the amount of defendant's commissions; that complainant has no knowledge of the various publishers with whom defendant made contracts for complainant's advertisements, or of the terms and conditions of said contracts; that the only means complainant has, other than through defendant, to obtain information as to complainant's transactions

with defendant is by communication with said publishers, of whom complainant does not possess a complete list, and that to obtain such information from the publishers it would be necessary to communicate with over six hundred persons and with regard to thousands of items covering a period of about sixteen months, and that information so obtained would of necessity be untrustworthy, and that there would be no method of compelling a disclosure by any publisher.

It is further alleged in the bill, in substance, that the net amount of money received as a result of said mail order advertising did not equal the cost to complainant of said advertising by a sum of about \$7,000, that defendant by the terms of said contract is liable to complainant therefor, and that defendant refuses to fulfil its guaranty and should be decreed to pay complainant the amount found due him on this class of advertising; that defendant claims there is now due it from complainant for advertisements placed by it a sum in excess of \$8,000; that complainant believes and charges the fact to be that there is no money due defendant on account of said transactions, that complainant has overpaid defendant and that there is due complainant a large sum of money, the exact amount of which is unknown to complainant and can only be ascertained upon a complete accounting between the parties and upon a discovery by the defendant; that in addition to said amount so overpaid there is due complainant an amount in excess of \$7,000 on account of defendant's said guaranty on said mail order advertising; that on January 27, 1915, defendant commenced a suit in the Municipal Court of Chicago against complainant based upon advertising placed for complainant and which covers thousands of items; that it will be impossible for complainant to defend said suit on account of facts in this bill alleged, unless an accounting is had between the parties and a discovery made by defendant; that complainant is informed and be-

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believes, and so alleges, that such accounting and discovery would make it possible to defeat defendant's suit and to establish a counterclaim in favor of complainant for thousands of dollars; that on or about March 8, 1915, defendant threatened to bring an additional suit against complainant for an amount approximating \$1,000 for advertising claimed to have been placed by it, and complainant believes that defendant, unless restrained, will commence such proceedings, and that such suits tend to harass complainant and affect his financial credit, and that the items mentioned are false and fictitious and not due from complainant; that on account of the fiduciary relations between the parties the defendant owed to complainant the utmost good faith and was bound to perform on behalf of complainant every act and thing that might inure to the financial benefit of complainant in the transactions above set forth; that the account between the parties consists of thousands of items, having reference to transactions with more than six hundred different publishers, and covers a period of sixteen months; that defendant has books and records showing its transactions with complainant; and that complainant is informed and believes, and so alleges, that said books and records will show other instances of wrongdoing by defendant and that it is indebted to complainant in a large sum of money on account thereof.

The bill prayed that defendant make full answer thereto but not under oath (answer under oath being waived); that defendant make a full discovery of all matters and things aforesaid, and set forth a true account of all its acts with respect to the business of complainant transacted for or with complainant; that an accounting under the direction of the court be taken; that defendant be decreed to pay complainant whatever sum should appear to be due him, he being ready, and hereby offering, to pay defendant whatever sum should appear to be due defendant; that

defendant make a full discovery concerning the books and records in its possession or control showing the transactions above mentioned, and permit complainant to inspect said books and records; and that, in the meantime, defendant be restrained from further prosecuting said pending suit in the Municipal Court, and from instituting any other suits growing out of said transactions.

No answer was filed to the bill. On April 5, 1915, complainant moved for a preliminary injunction as prayed in the bill, and the court ordered that said motion be referred to a master in chancery to take proofs and report his conclusions of law and fact and his recommendations upon said motion for such injunction.

The parties appeared before the master by their respective solicitors. On behalf of the complainant the bill of complaint was read as an affidavit; the rules of the Municipal Court were introduced and an affidavit of John F. Rosen, solicitor for complainant, was read, setting forth in full the amended statement of claim of Nelson Chesman & Company, filed in its pending suit in the Municipal Court of Chicago against George H. Mayr. The said statement of claim consisted of four pages, to which was attached, as "Exhibit A," a further statement consisting of twenty-seven pages of certain items of advertising, each page containing about thirty-two lines of such items. It was therein claimed that the total sum due from said George H. Mayr, after allowing all just credits, was \$6,268.16. It was stipulated between counsel that Nelson Chesman & Company had other claims against George H. Mayr than those involved in said pending suit in the Municipal Court and that it intended to bring suit therefor. On behalf of the defendant the written contract of August 1, 1913, mentioned in the bill, and the affidavit of A. A. Willson, manager of the Chicago office of defendant, were introduced in evidence. De-

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fendant called as its witness the complainant, George H. Mayr, and he was examined and cross-examined at length.

The said written contract was in the form of a proposition signed by defendant and addressed to complainant. At the bottom thereof was the writing: "Accepted by George H. Mayr." It is therein provided in part as follows:

"In consideration of your placing all your newspaper magazine advertising through our agency, we will agree to give you the benefit of the lowest possible net rates to our agency in all publications taken up, and charge you for said advertising 10% over and above the actual net cost *to us*. We are to make *for you* the best contract possible in all publications and to give you the benefit of all discounts for time or space that publishers allow *us*. In case the amount of space contracted for is not used by you, we are to charge you back the short rate, *provided we are unable to induce the publisher to cancel* same, which we always endeavor to do for *our clients*. We are to bill you the first of each month for daily and weekly papers for insertions of the previous month and for monthly publications of the current month, and we are to allow you the cash discount for prompt payment of your bills on the same date that publishers allow this cash discount to us. * * * It is understood and agreed that you or your representative can have access to our records, files and publishers' bills pertaining to your business. * * * The termination of this contract is one year from date, with the privilege of extension from year to year, unless written notice is given within 30 days before the expiration of same."

The affidavit of A. A. Willson contained allegations, in substance, as follows: That in the conduct of its business with complainant, defendant always made contracts in its own name for space sold by it to complainant, and in all instances is directly liable to the publishers for the same; that complainant knew that his liability to pay was solely to defendant and to no

other persons; that defendant did not undertake any fiduciary relation to complainant and that the relation between the parties was solely that of seller and purchaser of advertising space in publications; that defendant's records, files and publishers' bills, pertaining to its business with complainant, have at all times been and are now subject to complainant's examination, and that complainant has had the same opportunity of knowing their contents as defendant, and that complainant has never been denied access thereto; that in the transaction of business between the parties defendant rendered complainant monthly bills, setting forth the publications in which the advertisements were inserted, the date and price thereof, and accompanying which were copies of the newspapers containing each advertisement, and thereby complainant had ocular demonstration, by inspection, as to the amount of space occupied by the advertisements; that upon presentation of each of said monthly bills, with the exception of the last one, complainant examined the same in connection with said accompanying newspapers, and, if any errors or omissions appeared therein, called defendant's attention to the same, and each of said monthly bills was adjusted, settled and agreed upon by the parties and paid by complainant; that complainant has within his power the means of knowing and stating any error, mistake, omission, or other fact, relating to said bills so settled and adjusted, and can definitely state the same; that defendant's pending suit at law against complainant is for the collection of the last monthly bill rendered and for certain other unsettled items; that the account on which the suit is based has been fully stated and rendered to complainant in all its items, and that complainant has the means of verifying the correctness of the same, by examination of the advertisements themselves, as to the fact of their insertion and as to the amount of space, and has also the means by ref-

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erence to defendant's records, files and publishers' bills of ascertaining the exact price at which defendant purchased said advertising space as well as what discounts have been allowed defendant. Nowhere in said affidavit is there contained any denial of the allegations of fraud contained in said bill of complaint.

George H. Mayr, on direct examination by the solicitor for defendant, testified, in part, as follows:

"I was informed that the books and records of defendant would show other instances of wrongdoing on the part of defendant by Victor H. Young. * * * He was in my employ at the time. * * * He made this statement after he had discovered a great many discrepancies. * * * I suppose it was some time in December, 1914. * * * He said he had received the information from newspaper publishers. * * * We received a great many letters from publishers showing discrepancies in the amount charged us by Nelson Chesman & Co., and the amount charged to them. * * * After we terminated the relationship we found several discrepancies. * * * I repeatedly asked for information and would have to wait until such information came from the records in St. Louis. * * * I never asked for access or inspection of the records, files or publishers' bills. * * * The books and records were in St. Louis and * * * it was inconvenient to go there. I did not go to see the books for the reason we largely discovered the irregularities after discontinuing business, and for the reason that I supposed they would not be shown to me. * * * We did not measure the advertising for a long time, not until four or five months before we terminated our relationship. We could have ascertained the space by measuring it in the different newspapers, but we didn't do this. We relied on Nelson Chesman & Co."

On cross-examination Mr. Mayr testified in part as follows:

"For almost a year we did not measure the space. * * * Since checking up the bills and measuring the space I found discrepancies in their statements. * * *

I found that they charged me for more space than I was actually consuming. * * * The bills of the newspapers were rendered to Chesman & Co. I never saw any of them, and the bills rendered me by Chesman & Co. were supposed to show how much they paid the publishers. * * * Mr. Young obtained the information in regard to the space that had been used and billed to us by Chesman & Co., and he showed me the duplicate bills made by the publishers, and comparing these duplicate bills with the charges made to me by Chesman & Co. as to the total amount of space used, I found discrepancies. I can cite one instance where Chesman & Co. charged for 511 lines of advertising and the newspaper report showed that 375 lines were billed to me, and I paid for the first amount. * * * We obtained duplicate bills of short-rate charges from the publishers and I compared them with the bills rendered me by Chesman & Co. and found discrepancies. * * * I had not acquired any information up to the time of my termination of business relations with Chesman & Co. as to what they had paid the publishers. I relied upon their statements as to what they paid to the publishers as being correct.”

It was also stipulated between counsel that it is a custom among publishers to sell advertising space at different rates varying with the amount contracted to be used within one year, and if a customer uses less than the amount contracted for during such period the publisher will charge a higher rate for such lesser amount, or what is termed the “short-rate.”

The master found that the sworn bill of complaint stated a good and sufficient cause of action against the defendant and one which is based on well established grounds of equitable relief; that the allegations of said bill had not been denied by answer, and that the facts as sworn to therein had not been successfully controverted or denied by any of the affidavits or evidence offered by defendant. The master further found that a court of equity had jurisdiction of the cause, (1) because of the fiduciary relations existing between

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the parties as shown by the contract of August 1, 1913; (2) because of the allegations in said bill of fraud in relation to the excess charge for advertising space made by defendant to complainant over and above the amounts actually paid publishers by defendant for publishing complainant's advertisements, and in relation to the fraudulent appropriation of discounts by defendant; and (3) because of the numerous and complicated items of account in the matters in controversy between the parties; that the said items, being several thousand in number, cannot be expeditiously or accurately adjusted or adjudicated except upon an accounting in a court of equity; that, while paragraph 68 of the Practice Act (J. & A. ¶ 8605) might relieve some of the difficulties in connection with an accounting at law, it was not as expeditious or accurate as the method of accounting in chancery, and its existence did not supersede the jurisdiction of a court of equity; and that no demand for an accounting was necessary in view of the suit already pending in said Municipal Court, and for the further reason of the existence of the jurisdictional ground of fraud, fiduciary relations and complexity of account as a basis of equitable relief. The master recommended that a preliminary injunction issue in accordance with the prayer of the bill.

Objections were filed to the master's report and they were all overruled by him. Subsequently the report was filed in court and the objections thereto were ordered to stand as exceptions, and subsequently the court, after argument, overruled said exceptions and entered the interlocutory order or decree as above mentioned.

W. KNOX HAYNES and MICHAEL FEINBERG, for appellant.

JOHN F. ROSEN, for appellee.

MR. PRESIDING JUSTICE GRIDLEY delivered the opinion of the court.

This is a bill for a discovery and an accounting. It is predicated upon three well recognized grounds of equitable relief, viz.: fraud, fiduciary relations and numerous and complicated accounts. Incidental to the main relief asked the complainant prayed that, pending the hearing, the defendant be enjoined from further prosecuting its certain suit at law against complainant, and from instituting other threatened suits at law, involving some of the same transactions as are involved in the bill. Complainant's motion for such preliminary injunction was referred to a master, and after a hearing on the sole issue whether such injunction should issue the master recommended its issuance, and subsequently the court, after hearing argument on exceptions to the master's report, followed the recommendation and issued the order appealed from. The sole question before us is whether the Superior Court erred in granting the preliminary injunction. (*Billboard Pub. Co. v. McCarahan*, 151 Ill. App. 227, 233.)

The main contention of counsel for defendant is that the allegations of the bill and the evidence taken before the master disclose the existence of a remedy at law so adequate and complete as to preclude a court of equity from assuming jurisdiction, (1) because the allegations of fraud are insufficient and for aught that appears in the bill a court of law may apply an adequate and complete remedy; (2) because the facts stated in the bill do not show a fiduciary relation between the parties but merely that of debtor and creditor; (3) because it does not appear that the accounts are complicated, though numerous; and (4) because the Municipal Court as a court of law, having first acquired jurisdiction, has, by reason of section 68 of the Practice Act (J. & A. ¶ 8605) and section 9 of chapter 51 of the Revised Statutes of this State (J. & A.

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¶ 5526) and other statutes, every facility that a court of equity has for the conducting of an accounting.

Passing the question whether the facts stated in the bill sufficiently show that a fiduciary relation existed between the parties, we are of the opinion that the bill alleges sufficient facts showing fraud (which are not denied), and that the bill and the evidence taken before the master sufficiently disclose that the accounts are numerous and complicated, so as to give a court of equity jurisdiction. "Courts of equity have jurisdiction to compel an accounting, although the complainant has an adequate remedy at law, where fiduciary relations exist, or *fraud* is charged, or a discovery is sought." (1 Ruling Case Law, p. 224; *Billboard Pub. Co. v. McCarahan*, 151 Ill. App. 227, 235.) "Fraud is one of the broadest grounds of equity recognized by the courts. * * * It is the fraud which gives jurisdiction to this court, and the aggrieved party is not obliged to resort to another tribunal, possessed of less power and appliances to ascertain the truth, and grant the required remedy, although the other tribunal may have jurisdiction." (*Nelson v. Rockwell*, 14 Ill. 375, 376.) "Where the state of accounts between the parties is complicated and intricate, where the state of accounts between the parties is involved with third parties, where to do justice requires the employment of methods of investigation peculiar to courts of equity, and where it would be very difficult for a jury to unravel the numerous transactions, are conditions usually held to be sufficient to give a court of equity jurisdiction. The jurisdiction in equity does not, in such cases, depend upon the absence of a remedy at law, but upon its adequacy or practicability and upon the discretion of the court." (*Crown Coal & Tow Co. v. Thomas*, 177 Ill. 534, 540.) "In respect to the consideration of matters of account, the equitable jurisdiction of courts of equity is concurrent with that of courts of law, and no precise rule can be laid down as

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to the cases in which a court of equity will exercise its jurisdiction. A court reserves to itself a large discretion upon the subject and will refuse or reject the cognizance of cases of account as the circumstance of the particular case may render expedient.” (*Forster, Waterbury & Co. v. Webster Mfg. Co.*, 108 Ill. App. 41, 46.) And we think that it was proper for the Superior Court, having jurisdiction as a court of equity of the present bill for an accounting, to issue the preliminary injunction as incidental to the main relief prayed for. “The existence of a defense at law does not make an injunction against the action at law improper when for any reason the court of equity is a more suitable tribunal for the determination of the matter, or where equitable remedies, unavailable in the court of law, are necessary.” (22 Cyc. 798; see also *Forster, Waterbury & Co. v. Webster Mfg. Co.*, *supra.*) And, even admitting for the sake of the argument only that the Municipal Court as a court of law has, by reason of the statutes mentioned, every facility that a court of equity has for the conducting of an accounting, that fact, in our opinion, does not deprive the Superior Court as a court of equity, under the facts of the present case, of its long recognized jurisdiction in matters of account. (1 Corpus Juris, p. 619; 1 Story’s Eq. Jur., sec. 80; 1 Pomeroy’s Eq. Jur., sec. 279; *Garden City Sand Co. v. People*, 118 Ill. App. 372, 375; *Grimes v. Hilliary*, 38 Ill. App. 246, 248; *Kendallville Refrigerator Co. v. Davis & Rankin*, 40 Ill. App. 616, 625.)

And we do not think that under the facts disclosed there is any merit in the contention of counsel for defendant that the bill is fatally defective because no demand was made by complainant for an accounting before the bill was filed. (1 Corpus Juris, p. 627; *Chrichton v. Hayles*, 176 Ala. 223, 228.)

It is further contended by counsel for defendant that as it appears from the bill and the evidence taken

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before the master that defendant rendered monthly accounts to complainant, which accounts except the last one were settled and paid by complainant, said accounts cannot be opened up except as to particular items claimed to be erroneous. Under the facts disclosed we are of the contrary opinion. In *State v. Illinois Cent. R. Co.*, 246 Ill. 188, 241, it is said: "The terms 'stated' and 'settled' accounts are sometimes used as equivalent expressions. * * * An account stated is only prima facie evidence of its correctness. * * * It may be impeached for fraud or mistake. The general rule is, that in an application to open a stated account the plaintiff must *either* charge *fraud* or state particular errors. If a complainant seeks the aid of a court of chancery under such circumstances, the charges in the bill must be definite and reasonably certain." In the present bill there are definite charges of fraud in connection with said monthly bills or accounts rendered. "While an account stated or settled will ordinarily bar discovery and relief, yet if the balance ascertained is not correct or the settlement is infected with mistake or fraud, or brought about by undue advantage, equity will entertain jurisdiction for the purpose of opening it for restatement or for correction in part." (1 Corpus Juris, 716.)

For the reasons indicated we are of the opinion that the Superior Court did not err in entering the interlocutory order or decree appealed from, and the same is affirmed.

Affirmed.

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John Frederick Wallach et al., Appellants, v. Cornelius K. G. Billings et al., Appellees.

Gen. No. 20,733.

1. EQUITY, § 146*—*when bill by stockholders against directors of corporation not multifarious.* On general demurrer to a bill by stockholders of a bank seeking to enforce against one of its directors liability for losses sustained by the bank by reason of the unlawful manipulation of its funds by its president, where the liability sought to be enforced against such defendant was predicated on allegations that (1) defendant failed to perform his duties as such director, and (2) that such failure was due to defendant's "secret" agreement with such president to abdicate his functions as such director, allegations held to present only the single ground of failure to perform defendant's official duties, and not to justify the legal conclusion of an independent and different liability, for the reason that from the mere allegation that the understanding was secret it was not necessarily inferable that defendant entered thereinto with intent to facilitate unlawful acts or with knowledge that any such were being committed, and also because such an understanding, unless made with an unlawful or ulterior purpose, which was not alleged, was not inconsistent with a mere understanding that defendant would act as director if not required to take an active part in the affairs of the bank.

2. EQUITY, § 147*—*how bill by stockholders against director of corporation should be construed.* Where, in a bill seeking to enforce against a director of a bank liability for losses sustained by it while he held office as such director, the liability sought to be enforced is predicated on allegations that he failed to perform his official duties as such director, while at the same time such bill charges directors other than such defendant with more than mere nonfeasance in regard to the transactions resulting in such losses, such allegations tend to support the contention that such defendant's failure to perform his duties was not the proximate cause of the losses sustained by the bank, the bill being in such case construable most strongly against the pleader.

3. BANKS AND BANKING, § 43*—*what are duties of nonresident directors of national bank.* The National Banking Act (U. S. Rev. St., sec. 5146), providing "that at least three-fourths of the directors" of a national bank "must have resided in the State * * * in which the association is located for at least one year" prior to election as such, permits the election of nonresident directors by a national

*See Illinois Notes Digest, Vols. XI to XV. and Cumulative Quarterly, same topic and section number.

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bank, and contemplates that such nonresident directors shall not give the same attention to the affairs of the bank as that required of those directors who are resident.

4. EQUITY, § 147*—*how bill by stockholders of bank against director should be construed.* On general demurrer to a bill seeking to enforce against a nonresident director of a bank, liability for losses sustained by the bank while defendant held office as such director, where such liability is predicated on allegations that such defendant failed to perform his duties as such director, the question raised by the demurrer is whether the bill shows that such failure of defendant was the proximate cause of the losses alleged, and not whether a nonresident director can escape liability for failure to participate in the administration of the bank's affairs.

5. EQUITY, § 148*—*when bill does not sufficiently charge actual knowledge of matters.* Where in order to maintain a cause of action it is essential that defendant should have actual knowledge of the matters on which the cause of action is predicated, on general demurrer to the bill, an allegation in a bill that defendant "knew or by the exercise of ordinary care would have known" of such matters does not sufficiently charge such actual knowledge.

6. BANKS AND BANKING, § 43*—*what is liability of nonresident director of bank for losses of bank.* A nonresident director of a national bank who is not shown to have actual knowledge of an unlawful manipulation of the bank's funds, resulting in losses to the bank, or who is not shown to have assented to or connived in such unlawful manipulation, cannot be placed in the same category with resident directors who are shown to have known of, assented to, and connived in such unlawful acts, and are chargeable with a greater degree of activity in the affairs of such bank, so as to make the acts of such nonresident director the direct and proximate cause of the losses sustained.

7. BANKS AND BANKING, § 43*—*when director not liable for acts of other directors.* A director of a bank is not liable for the mere omission to watch and restrain other directors from wrongdoing, or for the misconduct of other directors, not participated in by such director as a wrongdoer, provided that such director has no wrong intention in such omission, and has no knowledge of wrongdoing by others.

8. EQUITY, § 148*—*when bill insufficient to show that failure of director to perform duties proximate cause of loss to bank.* On general demurrer to a bill seeking to enforce against a director of a bank liability for losses sustained by the bank while such defendant held office as such director, predicated on allegations that defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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failed to perform his duties as such director, averments *held* to show that such failure by defendant was not the direct and proximate cause of such losses.

9. EQUITY, § 114*—*when bill demurrable for want of necessary parties.* A bill seeking to enforce against a director of a bank liability for losses sustained by the bank while defendant held office as such director is demurrable for want of necessary parties, where others who held office as directors of such bank at the time when such losses were sustained are not made parties to the bill, for the reason that in case defendant is held liable he would be entitled to contribution from such codirectors, who should be bound by the decree.

10. EQUITY, § 114*—*how objection of want of necessary parties may be taken.* Where a final decree under a bill cannot be recovered without affecting the interests of persons not made parties thereto, the objection of want of necessary parties may be taken by general demurrer, at the hearing, on appeal or by writ of error, although if the objection be the want of proper though not necessary parties, such objection, by correct rules of practice, should be taken by demurrer, plea or answer.

11. BANKS AND BANKING, § 43*—*when director entitled to contribution from codirectors for losses paid.* A director of a bank, who was held liable for losses sustained by the bank while holding office as director, on the ground that he failed to perform his duties as director, is entitled to contribution from his codirectors whether the liability enforced against defendant be deemed as sounding in contract or tort, as defendant would be entitled to such contribution, though a tortfeasor, where it appeared that defendant was guilty of no intentional wrong, and was chargeable with a lesser degree of delinquency than such codirectors; and, if such directors be deemed trustees, all are guilty of a breach of duty in not attending to the affairs of the bank and are bound to contribute.

12. EQUITY, § 342*—*when dismissal of bill should be without prejudice to right to amend.* A decree dismissing a bill for want of necessary parties should be without prejudice to the right to amend the bill and bring in such parties.

13. APPEAL AND ERROR, § 971*—*when questions not considered on appeal.* Where the record shows that a bill was dismissed for want of equity, and also shows ground for dismissal for want of necessary parties, it cannot be held that such bill was dismissed for want of necessary parties in the absence of an affirmative showing that such point was raised in the trial court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

Statement by the Court. This appeal is from a final decree sustaining general demurrers to an amended and supplemental bill of complaint as amended, and dismissing the same for want of equity. Said bill was filed by complainants as stockholders in behalf of themselves and other stockholders of the Chicago National Bank, after demand on and refusal by its directors to bring the suit for the bank, to recover from Cornelius K. G. Billings, one of its directors, for losses to the bank resulting from his alleged negligence.

It contains many allegations unnecessary to set forth. After averments as to the filing of the original bill, incorporation and suspension of the bank, the interests of complainants as stockholders, and provisions of the law and the bank's articles and by-laws relating to its management, its officers, their duties, etc., the bill avers, in substance, that during the existence of the bank, from 1881 to 1905, its board of directors elected John R. Walsh as its president; that he controlled and dominated all of its business and the other officers elected by the board; that Billings was a sworn director from 1892 to 1905 inclusive; that from the beginning of 1900 until the bank suspended, December 18, 1905, neither the board of directors nor its members individually exercised any control or supervision over the business and affairs of the bank but permitted them to be dominated and controlled by Walsh as he saw fit; that during said period Walsh personally dominated and controlled large and various business enterprises of a speculative and hazardous character, in which the bank was not interested financially and which required vast sums of money to conduct; that by certain unlawful means and methods Walsh during said period diverted to such enterprises and misappropri-

ated and misapplied large amounts of the funds of the bank, aggregating millions of dollars, resulting in losses of over \$2,200,000; that the directors as a board and individually knew or by the exercise of ordinary care would have known all of these things; that Walsh had employed such unlawful means and methods also prior to said period of which notice had come to all the directors; that at different times from July, 1897, to June, 1905, the bank examiner made reports to the comptroller of currency, and the latter sent notices to the bank, calling attention to and criticising Walsh's unlawful practices, and that the board of directors and individual members were chargeable with notice thereof and by their neglect and failure to give attention to the business of the bank, suffered and allowed Walsh to continue such unlawful appropriations of the bank's funds during said period until the bank was forced to suspend, causing losses to the bank of over \$2,000,000 and its shares to become comparatively worthless, which could have been prevented had they, as directors, exercised supervision and control of the bank's business and affairs; that Billings was a man of large wealth and great business skill and acumen; "that he was in no way, shape or manner subservient to or dependent upon or under the influence of John R. Walsh, or any director or officer of the bank" and that had he exercised such reasonable or ordinary care as a director of a national bank should give to its business and affairs, he could and would have discovered such unlawful transactions in apt time to have prevented such losses or the greater part thereof; that said Billings "had an express or secret understanding or agreement with John R. Walsh during the year 1901, which continued * * * until the bank suspended * * * that he would not as director do anything in the way of administering affairs of the bank, or exercise supervision of its business, and that he would not do anything as a director of the bank," and that pursu-

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ant thereto, Billings utterly neglected his duties as director and by reason of such agreement and his consequent neglect of such duties became liable for such unlawful transactions independently of liability on other grounds; that by person or proxy Billings attended the annual meetings of stockholders held during the period aforesaid at which he was elected a director; that there were several directors' meetings during each year of said period attended by other directors but not Billings, at which certain specified matters came up for action; that Billings did nothing towards examining into, administering or supervising the affairs of the bank but permitted and allowed Walsh to conduct them as he saw fit; that he might have prevented such unlawful transactions by various steps indicated in the bill, among them by inducing the board of directors to appoint an auditing committee each year or investigating committee and to require detailed reports from its officers, by inducing action for the removal of Walsh and restitution of funds unlawfully taken, by informing the stockholders of such unlawful transactions that they might take some proper action, by personal examination of the bank's books and by investigation into its financial condition; that it was the duty of Billings to take these and other designated steps to prevent such unlawful transactions or their continuance; and that the consequent losses were the direct and proximate result of his neglect and failure to exercise any diligence or care whatever as a director of the bank, whereby he became liable to the bank for the sum of more than \$2,200,000.

The bill alleges the demand on and refusal by the bank to institute and prosecute these proceedings, that none of complainants prior to the suspension of the bank was officially connected therewith or had knowledge or information of such unlawful transactions or that the board of directors and said Billings were neglecting their duties as directors; that since January 1,

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1901, Billings has been out of the State within the statute of limitations; that Walsh became insolvent just prior to the suspension of the bank and continued so until his death in 1911; and that certain stockholders therein named including William Best, Fred M. Blount and Maurice Rosenfeld, directors of the bank during said period and equally guilty with Billings and legal representatives of other directors, since deceased, should not share in a recovery under the bill.

The relief prayed is that Billings be held and decreed liable for and on account of the wrongful neglect of his duties as such director; that the amount of loss to the bank in consequence thereof be ascertained and he decreed to pay it or so much as may be just and equitable; that the court should determine what stockholders are entitled to participate in the recovery and make distribution among them, and other incidental relief.

NEWMAN, POPPENHUSEN & STERN, for appellants; JACOB NEWMAN and CHARLES T. FARSON, of counsel.

SEARS, MEAGHER & WHITNEY, for appellee Cornelius K. G. Billings; NATHANIEL C. SEARS, JAMES F. MEAGHER and JESSE J. RICKS, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

While there are other defendants, the bill seeks recovery from Billings alone of the seven directors of the bank, on two grounds of liability, (1) his failure to give any attention whatever to his duties as a director and (2) his so-called secret agreement to abdicate his functions as such. When analyzed, however, they constitute the single charge of inattention to his official duties, for the allegations with respect to said agreement do not justify the legal conclusion of an independent or different liability. They are not such as support an inference that Billings entered into the

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agreement for the purpose of doing an intentional wrong or facilitating said unlawful transactions or with actual knowledge that they were then being carried on. Such an inference does not follow merely from characterizing the understanding as "secret." The agreement described, taken with other averments in the bill, was not inconsistent with a mere understanding that Billings would remain a director if not required to return from out of the State to attend the board's meetings and take an active part in managing the bank's affairs, and we fail to see that a mere understanding to that effect, unless made for an unlawful or ulterior purpose, which is not charged, aggravates or changes the character of the negligence elsewhere charged in the bill of inattention to his official duties.

In the absence, therefore, of any averments of actual knowledge of the unlawful transactions or of a positive wrong or actual misfeasance on the part of Billings—and none appears in the bill—his liability from the facts set up in the bill rests wholly on the charge of inattention to official duties.

But construing the bill most strongly against the pleader, it charges the other directors with more than mere nonfeasance and supports appellees' contention that Billings' inaction was not the proximate cause of the bank's losses.

Billings appears to have been a nonresident director. While the bill does not expressly so aver (unless we import into it allegations of a former bill filed herein November 21, 1910, which the bill asks to be considered with reference to continuing the receivership), still the bill shows that although elected as a director from year to year he was almost continuously absent from the State during the years it is sought to hold him liable as a director, and up to the filing of the bill, returning here only on matters of personal business. The National Banking Act unquestionably recognizes

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the right to elect nonresident directors. It provides "that at least three-fourths of the directors must have resided in the State, territory or district in which the association is located for at least one year immediately preceding the election, and must be residents therein during their continuance in office." Section 5146, U. S. Rev. St. It presumably contemplates some advantages from having some nonresident directors. But it may reasonably be inferred from the nature of the banking business and from the specific requirement that at least three-fourths of the directors shall be residents, and because of the inconveniences and obstacles attending nonresidence, that the act did not contemplate that nonresident directors should exercise the same vigilance and give the same attention to the bank's affairs as is manifestly required of the resident directors. As stated in *First Nat. Bank of Concord v. Hawkins*, 174 U. S. 364, referring to said act: "One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may, for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money."

But as we view it, the question is not whether Billings as a nonresident director can entirely escape liability for not attending the board's meetings and participating in the administration and management of the bank's business and affairs, but whether the bill shows that the failure so to do was the proximate cause of the bank's losses for which it is sought to hold him liable. Does the bill show such a casual relation?

These essential facts stand out prominently in the bill either in the form of express averments or inferences that should, if not true, have been negatived: (1) That the losses ensued from misuse of the funds of the bank by its president Walsh; (2) that a quorum

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of the bank's directors frequently held meetings, at which Billings was not present, and thereby assumed the functions of their office and undertook in some degree, at least, to supervise and transact the bank's business; (3) that they thus placed themselves in a position to know and must have known of the unlawful transactions which were of such magnitude as to involve loans of millions of dollars; (4) that they permitted Walsh to engage in such transactions, either by conniving at or assenting thereto; (5) that all of the bank's officers and directors except Billings were dominated and controlled by Walsh and permitted him to exercise control of them and the bank's affairs; and (6) that Billings had no actual knowledge of such unlawful transactions, and was guilty of no act intended to promote them.

We need not refer specifically to the several averments from which these facts are deducible, when appellants' counsel themselves say in their brief: "The bill in this case shows that Mr. Walsh absolutely dominated all the directors of the bank, *except Billings*, that none of them acted except as Walsh commanded them to act, and therefore none of them exercised the functions and duties imposed upon them by law. In fact all the directors *except Billings* simply obeyed the commands and directions of Mr. Walsh and never exercised their individual judgments respecting any matter or thing * * * ." This statement practically admits what is above summarized and recognizes what are most palpable inferences from the bill that the other directors either had actual knowledge of such unlawful transactions and assented thereto or connived at them; and in order to place Billings *in pari delicto*, counsel added to their statement, "and Mr. Billings failed to do so under this secret agreement with Mr. Walsh." But, as before stated, no such effect can be given to said agreement. The bill does not charge Billings with actual knowledge of such transactions,

and significantly fails to charge that the other directors did not know of, or connive at, or assent to them. In fact it is difficult to understand how resident members of the board sitting around the directors' table could have been ignorant of them.

The bill attempts to charge Billings with such knowledge by averments that he "knew or by the exercise of ordinary care would have known" of particular facts including the fact that the other directors "permitted, suffered and allowed" Walsh to operate the bank and carry on its business and affairs, and "did his bidding without question." But averments in this alternative form do not charge Billings with actual knowledge (*Babcock Bros. Lumber Co. v. Johnson*, 120 Ga. 1030; *Southern Bell Telephone & Telegraph Co. v. Starnes*, 122 Ga. 604; *Durell v. Hartwell, Williams & Kingston*, 26 R. I. 125), and without knowledge, connivance or assent on his part, he cannot, in our opinion, be placed in the same category as the resident directors who were chargeable therewith as well as with a greater degree of vigilance and activity, and whose conduct either by voluntary co-operation or connivance enabled Walsh to engage without restraint in such unlawful transactions and thus became the direct and proximate cause of the losses ensuing therefrom.

It is charged that Billings did not watch and restrain them. "But," as said in *Movius v. Lee*, 30 Fed. 298, "it is nowhere adjudged that all (directors) must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of others." It has been held, too, that a director is not liable for the misconduct of codirectors not participated in as a wrongdoer by him. *Briggs v. Spaulding*, 141 U. S. 132; *Fisher v. Graves*, 80 Fed. 590; *Commercial Bank of Bay City v. Chatfield*, 121 Mich. 641. "Even trustees," says Chief Justice Ful-

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ler in the *Briggs* case, *supra*, "are not liable for the wrongful acts of their co-trustees unless they connive at them or are guilty of negligence conducive to their commission."

To avert the consequence of the mismanagement of the bank, the bill avers that Billings might have done various things therein set forth. But so far as they relate to any steps he might have taken in the ordinary exercise of his functions as a director, it is not apparent that, being the only director not dominated and controlled by Walsh, his suggestions would have been of any avail, and what he might have done to stem the disaster does not appear to have been the direct cause of it. It might have occurred just the same.

The bill charges Billings with passive negligence, but it supports the inferences of connivance or assent as aforesaid on the part of the other directors. It was brought upon the theory of liability to the bank. But to quote again from the opinion in the *Briggs* case, *supra*:

"Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the *natural and necessary consequences* of omission on their part."

The same doctrine has been recognized in other cases where it has been sought to hold directors of a bank liable for the negligence either of themselves or the bank's agents. (*Warner v. Penoyer*, 91 Fed. 587; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630; *Bloom v. National United Ben. Sav. & L. Co.*, 152 N. Y. 114; *Kavanaugh v. Gould* (App. Div.) 131 N. Y. Supp. 1059.)

It is difficult, therefore, to escape the conclusion that the direct and proximate cause of the losses for which

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it is sought to hold Billings was Walsh's unlawful transactions aided by the connivance, or assent, or voluntary co-operation of some if not all the other directors, and not Billings' inaction, whatever may have been his duty in the premises.

This conclusion obviates the necessity of considering any other grounds for dismissing the bill. We agree with appellees, however, that if the bill was not demurrable on the ground considered, it would be for the want of necessary parties, on the ground that Billings would be entitled to the right of contribution and they should be bound by the decree. Appellants urge that the question cannot be raised on general demurrer. But as stated in *Johnson v. Huber*, 134 Ill. 511: "It is true, that by the rules of correct practice the objection to the bill for want of proper parties should have been raised by demurrer, plea or answer; but where the omitted party is not only a proper but a necessary one, so that a final decree cannot be recovered without affecting his or her interests, the objection may be taken at the hearing, or on appeal or writ of error."

We have no doubt that whether the case be regarded as sounding in tort or contract the right of contribution would exist, for, in the former case, Billings not being charged with any intentional wrong and with a lesser degree of delinquency than the others, would have such right though a tortfeasor (7 Am. & Eng. Encyc. of Law (2nd Ed.), 364; *Wanack v. Michels*, 215 Ill. 87; *Farwell v. Becker*, 129 Ill. 261; *Pennsylvania Steel Co. v. Washington & B. Bridge Co.*, 194 Fed. 1011-1013; *Vandiver v. Pollak*, 107 Ala. 547; *Lowell v. Boston & L. R. Corporation*, 23 Pick. [Mass.] 24-32); and, in the latter case, on appellants' theory that directors are liable as trustees of the corporation or the body of the stockholders (*Hooker v. Midland Steel Co.*, 215 Ill. 444; *Thompson on Corporations*, par. 1269), all the directors were equally guilty of a breach of duty

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in not attending to the bank's affairs and would be bound to contribute. (*Machen* on Modern Law of Corporations, par. 1635.) That the other directors ought on such ground to have been made parties defendant is supported by unquestioned authority. The reason of the rule is well stated in *Mandeville v. Riggs*, 2 Pet. U. S. 482, and Perry on Trusts (2nd Ed.), sec. 876, and recognized in *Hutchinson v. Ayres*, 117 Ill. 558; Beach on Trusts, par. 542; *Cunningham v. Pell*, 5 Paige N. Y. 607; *Boyd v. Gill*, 19 Fed. 145; *Pennsylvania Steel Co. v. Washington & B. Bridge Co.*, 194 Fed. 1011; *Ramskill v. Edwards*, L. R. (1886), 31 Ch. Div. 100, and such right of contribution made them necessary parties. (*Chandler v. Ward*, 188 Ill. 322; *North Hudson Mut. Building & Loan Ass'n v. Childs*, 82 Wis. 460.)

But if the bill was dismissed for want of necessary parties, it should have been without prejudice, that an opportunity might have been given to bring them before the court. (*Thomas v. Adams*, 30 Ill. 37; 1 Daniel Ch. Pl. & Pr. (5th Ed.), p. 288, note 2.) It might be said that complainants had such opportunity when they elected to stand by their bill instead of again amending it, and from the fact that they voluntarily dismissed two of the directors out of the case. The record, however, does not disclose that the point of necessary parties was made in the court below, and the bill was dismissed for want of equity on its face as against each of the demurring defendants. While there may be some authority on such a state of facts for the unqualified dismissal of the bill, we are not disposed to hold that the dismissal was justified for want of parties in the absence of an affirmative showing that the point was raised in the court below. But for reasons already stated, the decree will be affirmed.

Affirmed.

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John F. Wallach et al., Appellants, v. Cornelius K. G. Billings et al.

On Appeal of Pauline Cahn et al., Executors, v. Chicago National Bank et al., Appellees.

Gen. No. 20,906. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

Bill by John F. Wallach *et al.*, complainants, against Cornelius K. G. Billings *et al.*, defendants, on the appeal of Pauline Cahn *et al.*, executors, against the Chicago National Bank *et al.*, appellees.

A decree sustaining a general demurrer to the bill and dismissing the bill for want of equity affirmed on the authority of *Wallach v. Billings*, Gen. No. 20,733, *ante*, p. 605.

FOREMAN, LEVIN & ROBERTSON, for appellants.

SEARS, MEAGHER & WHITNEY for appellee Cornelius K. G. Billings; NATHANIEL C. SEARS, JAMES F. MEAGHER and JESSE J. RICKS, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Employers' etc., Corp. v. Kelly Const. Co., 195 Ill. App. 620.

**Employers' Liability Assurance Corporation, Limited,
of London, England, Appellee, v. Kelly-Atkinson
Construction Company, Appellant.**

Gen. No. 20,737.

1. ACCOUNT STATED, § 3*—when statements of premiums by employers' liability insurance company not account stated. In an action to recover premiums due under policies insuring defendant against loss due to liability for personal injuries sustained by employees while in the employ of defendant, which policies provided that the amount of the premium payable thereunder should be a percentage of the amounts paid by defendant for wages, to be computed from correct reports thereof to be furnished by defendant for the purpose of such computation, statements of the amounts of such premiums based on a report of defendant later found to be incorrect, *held* not to be an account stated, operating to bar the original rights of action accruing under the policies, although defendant paid the amount stated in such statements to be due, and plaintiff received such payment without objection to the correctness of defendant's reports, such acts being contemplated by the contract and essential to its complete execution, and not a basis for the adjustment of a controversy, for which reason such acts were not independent of the original causes of action so as to form a new contract, based on a new consideration and involving a promise to pay the amounts found to be due.

2. ACCOUNT STATED, § 3*—when written contract not account stated. The principle that an account stated of the amount due under a contract will bar the original cause of action accruing on such contract has no application to a case of the statement of the amount due under a written contract, where there is no dispute as to the amount due and plaintiff has no means of verifying the amount due independently of information furnished by defendant.

3. ACCOUNT STATED, § 3*—when no acquiescence in account so as to constitute stated account. Where a plaintiff renders an account of the amounts due under a written contract on information furnished by defendant as to matters of which defendant has exclusive knowledge, plaintiff cannot be held to acquiesce in the correctness of such information by the mere fact that it failed to make objection thereto, where it had no means of verifying its correctness, and therefore had no grounds for such an objection.

4. ACCOUNT STATED, § 16*—when account stated not conclusive. The principle that an account stated of the amounts due under a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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contract will bar the original right of action accruing under such contract does not apply to transactions involving fraud, concealment or misrepresentation.

5. ESTOPPEL, § 74*—*when employers' liability insurance company not estopped by laches from questioning accuracy of reports.* In an action to recover the amounts of premium due under policies insuring defendant against loss due to liability for bodily injuries sustained by employees while in defendant's employ, where the policy provided that the amount of such premium should be a percentage of the amounts paid by defendant for wages to be determined from correct reports of such amounts to be furnished by defendant, plaintiff held not estopped by laches from questioning the accuracy of such reports by the fact that for five years it continued to accept payments based on such reports without objection to the accuracy thereof, although such want of objection may have resulted in a change in defendant's position, in that it meantime lost its books, and although plaintiff had the right to compel a view and examination of defendant's books, and failed to assert such right, for the reason that plaintiff was not required to assume or suspect fraud where the business relation between the parties was such as to invite confidence in such reports.

6. WITNESSES, § 196*—*when witness may use memoranda to refresh memory.* It is proper to permit a witness to read from a memorandum book or other writing items entered therein by the witness at the time of the transactions testified to, although after inspecting the writing witness may have no independent recollection of the facts therein recorded, provided witness can state that the memoranda were made at the time of such transactions or within such subsequent time that he had a perfect recollection thereof, and that at the time of making such memoranda he knew the matters recorded to be true, or now knows that he would not have made such memoranda unless he had then so known, and also provided that the writing be produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusions as to the facts recorded.

7. WITNESSES, § 198*—*when truth of facts in memoranda question for jury.* Where a witness is permitted to read from a memorandum book in which he has recorded the facts testified to, the question whether the facts are correctly set forth therein, as testified to, is one of fact for the jury.

8. WITNESSES, § 195*—*when memoranda of proper character to be used by witness to refresh memory.* In an action to recover premiums due under policies insuring defendant against loss by reason of liability for bodily injuries sustained by employees while

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in defendant's employ, where the policy provided that the amount of the premium should be a percentage of the amounts paid by defendant for wages to be computed from correct reports of such amounts to be furnished by defendant, *held* not error to permit a witness to read from a memorandum book the amounts of certain pay rolls, notice to produce the originals having been given and not complied with, and there being evidence that the amounts therein recorded were copied from original sources, and so numerous as to render independent memory thereof practically impossible, as such evidence was competent, regardless of whether the amounts were copied from pay rolls or journals, as being the next best evidence and the best and only evidence obtainable of items copied from defendant's documents or books, by which defendant would have been bound if it had produced them.

9. EVIDENCE, § 366*—*when question not objectionable as calling for conclusion.* Questions to a witness are not objectionable as embodying conclusions where such questions are mere references to evidence to which it is desired to draw the attention of the witness.

10. INSTRUCTIONS, § 96*—*when refusal of instruction on credibility of witnesses not error.* Where a witness was permitted to read from a memorandum book entries made at the time of the transactions testified to and where a general instruction as to the credibility of witnesses was given, *held* not error to refuse an instruction that the credibility of what witness was permitted to read from his memorandum book depended on the testimony and credibility of the witness himself, for the reason that the instruction refused singled out the testimony of a particular witness for the application of the test of credibility.

11. INSTRUCTIONS, § 96*—*when cautionary instruction as to credibility of witness improper.* The principle that a cautionary instruction as to the credibility of the testimony of an accomplice is proper has no application to the case of a witness who is permitted to read from a memorandum book entries made at the time of the transactions testified to.

12. INSURANCE, § 158a*—*when evidence of number of men employed and pay rolls inadmissible in action by employers' indemnity insurance company for premiums.* In an action to recover the amounts due for premiums under policies insuring defendant against liability for bodily injuries sustained by employees while in its employ, where each policy provided that the amount of such premium should be a percentage of the amounts paid by defendant for wages to be computed from correct reports of such amounts furnished by defendant, evidence of the average number of men employed by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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defendant during the period for which premiums were sought to be recovered and its pay rolls for such time *held* properly excluded, the real question for the jury being the actual amount of such pay rolls shown in some cases by the original pay rolls and in others by what purported to be correct copies of their totals, so that where defendant relied on the accuracy of its reports, the evidence rejected was incompetent as being uncertain and indefinite, and in not legitimately tending to show the accuracy of such reports or to refute the testimony of plaintiff that such reports were inaccurate.

13. INSURANCE, § 158b*—*when exclusion of evidence whether foreman made pay roll not prejudicial*. In an action to recover the amounts due for premiums under policies insuring defendant against liability for bodily injuries sustained by employees while in its employ, where each policy provided that the amount of such premium should be a percentage of the amounts paid by defendant for wages, to be computed from correct reports of such amounts to be furnished by defendant, but not including wages paid to employees of defendant's subcontractors, and where one of plaintiff's witnesses was testifying to memoranda copied from original pay rolls of defendant, in which memoranda witness had noted the fact that a certain pay roll was sent in by a foreman who in certain cases had been a subcontractor of defendant, the exclusion of a question to such witness asking whether a pay roll so indorsed was that of the foreman in question, *held* not prejudicial where it appeared affirmatively that pay rolls of subcontractors did not come into defendant's office, and also that the pay roll in question was one on which defendant recognized its obligation to pay a premium under the policy sued on.

14. INSTRUCTIONS, § 151*—*when requested instruction properly refused*. A requested instruction is properly refused where it is already covered in the charge.

15. INSURANCE, § 158b*—*when refusal of instruction as to burden of proof not reversible error*. In an action to recover amounts due as premiums under employer's indemnity insurance policies which provided that the premiums should be based upon the wages paid, as deduced from reports furnished by insured, except wages paid employees of subcontractors and employees in certain territory, *held* that the refusal of an instruction that plaintiff had the burden of proving that each item of wages was not that of a subcontractor nor for work performed in excepted territory was not reversible error.

16. CHAMPERTY AND MAINTENANCE, § 2*—*when insurance policy not void as providing for maintenance*. Policies insuring defendant

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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- against loss due to liability for bodily injuries sustained by employees while in defendant's employ, which provide that insurer shall have the right at its own cost to defend and settle actions for damages against insured, and forbidding, except at its own cost, the settlement of such actions without the consent of insurer, are not void as amounting to maintenance, as the liability of insurer under the policy gave insurer an interest in the litigation which prevented the doctrine of maintenance from applying thereto, the rigor of the common law in applying the doctrines of champerty and maintenance having been relaxed as to modern forms of business.

17. INTEREST, § 80*—*when instruction as to recovery of statutory interest on liability insurance premiums not erroneous.* In an action to recover the amounts due as premium under policies insuring defendant against loss due to liability for bodily injuries sustained by employees while in defendant's employ, an instruction that plaintiff could recover statutory interest on amounts found to be due from the time such amounts became due under the terms of the policies, *held* not erroneous for the reason that each policy was "an instrument in writing" within the meaning of Hurd's Rev. St., ch. 74, sec. 2 (J. & A. § 6691), providing for the recovery of interest at five per cent. on moneys due under "any bond, bill, promissory note or other instrument in writing."

18. INTEREST, § 17*—*when interest recoverable on liability insurance premiums.* The right accruing under Hurd's Rev. St., ch. 74, sec. 2 (J. & A. § 6691), to recover interest on amounts found to be due under policies of liability insurance, requiring the payment by defendant of a premium in the amount of a certain percentage of the amounts paid by defendant for wages, which statute provides for the recovery of interest at five per cent. on moneys due under "any bond, bill, promissory note or other instrument in writing," is not affected by the fact that a controversy as to the correct amounts due as premiums under such policies arose subsequently to the accrual of plaintiff's right to such premiums, as such premiums became due as each policy expired, and the amounts were easily calculable at such time, and stood finally liquidated and ascertained as of that date.

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. This is an action brought by appellee, a casualty company, against appellant, a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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corporation engaged in construction work, to recover additional or excess premiums under twenty-five of appellee's policies, indemnifying appellant against loss for damages from common law or statutory liability for bodily injuries to its employees and others. The amended declaration contains twenty-five counts, a count for the claim under each policy, and the common counts. Defendant pleaded the general issue and statute of limitations, and appellee replied. The total amount claimed with interest exceeded \$30,000. Verdict and judgment were in favor of plaintiff for \$15,000.

The policies covered a period extending from June 1900 to June 1904, and expired at different intervals by their terms or cancellation. The last was adjusted in March 1904. Each policy contains this provision:

"C. The premium is based on the compensation to employees to be expended by the assured during the period of this policy. If the compensation actually paid exceeds the sum stated in the schedule hereinafter given, the assured shall pay the additional premium earned; if less than the sum stated, the corporation will return to assured the unearned premium *pro rata*."

This last clause was subject to a provision for a minimum premium which does not appear to figure in this case. The schedule referred to, which is part of the contract, states the premium rate for each \$100 of compensation or wages paid to said employees and also the estimated amount of said wages for the period of the policy.

Each policy also provides:

"E. The corporation shall have the right and opportunity at all reasonable times to examine the books of the assured so far as they relate to the compensation paid to his employees. * * * The assured shall, if requested, furnish the corporation with a written statement of the amount of such compensation during any part of the policy period under oath if required."

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The premium paid at the time of taking out the policy was computed by applying said rate to said estimated amount, and on its expiration defendant made a report of what purported to be the actual amount, and thereupon plaintiff rendered a bill for the additional or excess premium earned, or refunded a proportionate part of that already paid, according to whether the actual wages exceeded or were less than the estimated wages.

Each special count alleges that the amount of the actual compensation or wages paid by defendant to its employees mentioned in the policy declared on, exceeded the estimated amount and that defendant's statement or report of the actual amount was false and fraudulent.

Plaintiff's agent sometimes compared such reports with a private memorandum of pay rolls kept by defendant's secretary, but at no time did he examine or obtain access to defendant's original pay rolls or books, and not until near the close of 1903 did plaintiff make any request of defendant to produce them, when it was informed by defendant's secretary (who furnished the reports) that they were lost or destroyed. Plaintiff's agent testified that on certain occasions before their loss or destruction was reported, he sought to verify defendant's report, but on one pretext or another defendant urged the inconvenience of examining its original books and papers at those times. While there was some loose reference to a "final account" and the closing of all transactions between the parties on plaintiff's books, the evidence does not indicate that there was anything in the nature of a general accounting or of striking a balance of accounts.

On failure of defendant on notice or under process of court to produce any of its original books, pay rolls, etc., plaintiff offered in evidence some of defendant's original pay rolls and time books, obtained from defendant's storehouse through a writ of replevin.

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The wages, as shown by them, greatly exceeded the amounts as reported by defendant. To show the amount of pay rolls not produced or found, secondary evidence was resorted to. Plaintiff called Sierts, defendant's bookkeeper for the periods in question, who testified that for personal convenience he kept a private memorandum book into which he entered the correct amounts of all the pay rolls. He testified that some of the pay rolls were sent in by the foreman of the particular job and some were made up by him from the foreman's time books sent into the office; that it was a part of his duty to enter and he did correctly enter the total of each pay roll into the journal and ledger; that, except during about the first six months the policies were in force, he correctly entered the amounts of the several pay rolls in said private memorandum book at or about the same time he entered them in the journal and ledger, and the amounts of the pay rolls for said six months he correctly copied into his private book from the journal after comparing it with the pay rolls kept on file. In view of his inability to remember their respective amounts, he was permitted to read them to the jury.

ZANE, MORSE & MCKINNEY, for appellant; JOHN M. ZANE and CLARENCE E. ELDRIDGE, of counsel.

WINSTON, PAYNE, STRAWN & SHAW, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

1. Appellant contends that the transactions by which the amounts due upon the several policies were ascertained made them accounts stated, and as a conclusion therefrom that the original accounts were merged therein upon which no action would lie, plaintiff's remedy being an equitable action upon the stated accounts to surcharge or falsify, for fraud or mistake, an action of which the Municipal Court of Chicago has

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no jurisdiction. As we cannot assent to the premise we need not discuss the conclusion.

The basis of the contention that the transactions constituted stated accounts is that plaintiff made no objection to the "settlements" and no claim that defendant's reports were incorrect. The use of the term "settlement" is somewhat confusing. There was nothing in the transaction to justify its use in the sense that there was either an accord and satisfaction or a stated account. There was no dispute or controversy between the parties as to the amount of the pay rolls or the amount of premiums. Defendant alone knew the former and the latter was a matter of mere calculation when the former was known. There might be some basis for the contention had there been a controversy or dispute between the parties as to the amount due on the policies and plaintiff had accepted defendant's reports as the basis of an adjustment thereof, but these were not the facts. Reduced to its simplest form, the transaction with regard to each policy was simply this: that defendant, pursuant to its obligations so to do under the policy, reported the amount of its wages so that the premium could be computed and billed according to the rate specified in the policy. It was not something done independently of the contract forming a new consideration and a new and distinct promise to pay the amount found due, but the acts done were contemplated by the contract and essential to its complete execution, and therefore did not, as contended, have the effect to change it into one of an account stated so as to preclude recovery on the original cause of action.

Appellant finds analogy to an account stated in the claim that plaintiff acquiesced in the correctness of defendant's reports because it made no objection thereto and rendered its bill thereon, but we think there can be no application of the rule of a stated account to this state of facts, particularly (1) because

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the bill rendered was for an amount due according to a written instrument for the payment of money over which there was no dispute, and (2) because plaintiff had no independent means of verifying the information on which it was based.

In *Middleditch v. Ellis*, 28 Exch. (Eng.) 623, an action was brought upon an account stated where the parties to a mortgage had met and agreed upon a balance due thereon. The court said:

“The defendant is charged with nothing but the money secured by the deed; there is no consideration for the suggested new liability, except the ascertaining how much remains due on the deed. It is a perversion of language to speak of this as an account stated; it is merely a process adopted for the purpose of ascertaining how much of the original debt has been discharged; and all which is really done is to make out to what extent the defendant remains liable upon the deed. This does not entitle the plaintiff to proceed as on a new liability arising as if from an account stated.”

In *Young v. Hill*, 67 N. Y. 162, it was said:

“When a sum of money is secured by a deed and the balance is struck for the purpose of ascertaining how much remains due thereon, and the obligor admits the correctness of the amount and promises to pay it, an action will not lie on this account and promise, but the action must be brought on the security.”

In *Valley Lumber Co. v. Smith*, 71 Wis. 308, it was held that the principle of law of a stated account has no application where the claim is the subject of a special contract.

While the written instrument in each of these cases was a specialty, yet the same principle was applied in *Jasper Trust Co. v. Lamkin*, 162 Ala. 388, 24 L. R. A. (N. S.) 1237, and in *Thomasma v. Carpenter*, 175 Mich. 428, 45 L. R. A. (N. S.) 543. In the former the parties to promissory notes had met and made a calculation as to the amount due thereon, and it was held that the mere calculation of the amount did not merge the notes

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into an account stated. In the latter case a statement of account for personal services under an express contract to pay a specified sum for a specified service was rendered without objection, and it was held not to come within the meaning of the rule applicable to an account stated. We think the principles of these cases are applicable to the facts at bar.

But there is another reason why the transaction cannot be deemed an account stated. There was no acquiescence by plaintiff in the correctness of defendant's reports on which the bills were rendered. The debtor had exclusive knowledge of the facts on which the bills were rendered and the creditor had no independent means of ascertaining their correctness nor grounds for objecting thereto.

In *Vanuxem v. New York Life Ins. Co.*, 122 Fed. 107, it was held that the general rule as to admission of items of an account from failure to object thereto was not applicable where the creditor had no means within his knowledge of verifying the amount and had only before him such items as the debtor chose to submit. Attention was also called in that case to the anomaly that exists here, of the debtor instead of the creditor invoking the rule, the court adopting the language of counsel to the effect that the admission of the correctness of an account rendered from failure to object thereto and the acquiescence in an account received from retention of it without objection must be the admission and acquiescence of the party charged or indebted.

To support its contention as to an account stated, appellant relies upon *State v. Illinois Cent. R. Co.*, 246 Ill. 188, but we think it is distinguishable from the case at bar in this essential fact, as well as others, that knowledge of the omitted items of account in that case was imputed to plaintiff.

Reaching the conclusion that there was no stated account, we need not discuss appellee's contention for

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which there is ample authority, that the doctrine of an account stated does not apply where the transaction involves fraud, concealment or misrepresentation. Nor need we discuss any of appellant's other contentions based on the doctrine of a stated account.

Appellant also urges that as plaintiff had the right to demand a view and examination of defendant's books and to compel an examination if refused, and has waited over five years before attempting to assert its rights, it was not only guilty of laches but had induced defendant to alter its position and was thereby estopped from claiming that the reports made and accounts as settled were incorrect. The only change in defendant's position suggested is the destruction or loss of its books, which can hardly be ascribed to anything plaintiff did. However, when this case was here on appeal before (182 Ill. App. 372), we said that the evidence disclosed nothing until just before the suit that led appellee to question the accuracy of such reports or to put it on inquiry, and that it would be a strange doctrine to hold that plaintiff was guilty of lack of diligence because it did not assume or suspect fraud where the nature of the business relation was such as to invite its confidence in defendant's reports.

2. It is contended that it was error under the circumstances above stated to permit the witness Sierts to read from his private memorandum book the amounts of the pay rolls not produced, which he had entered therein as aforesaid. Under very similar circumstances a witness was permitted to read from a book entries showing dates and amounts of the delivery of coal in *O. S. Richardson Fueling Co. v. Seymour*, 235 Ill. 319. The principle upon which such testimony is admissible is stated in *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 338-347. It is there said:

“Another condition under which a writing may be used is where a witness, after inspecting a writing, still has no independent recollection of the facts stated

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therein, but is able to state that he correctly reduced them to writing at the time of the occurrence or within such a time afterward that he had a perfect recollection of them. If the witness knows that the facts were recorded at the time or when they were fresh in his memory, and that the memorandum would not have been made unless he knew the facts therein stated to be true when it was made, he will be permitted to make use of it, provided the writing is produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusion as to the fact."

These several conditions are presented in the instant case. If the items were correctly set forth, as testified to,—a question of fact for the jury,—they constituted the next best evidence, if not the only existing evidence, of the amounts of such pay rolls; and in view of the testimony that these items were correctly copied from such original sources and were so numerous and for such sums as to render independent memory of them practically impossible, we think they were admissible, regardless of when they were copied or whether they were copied from the pay rolls or journal. In either event, they constituted the next best obtainable evidence of items copied from defendant's documents or books by which it would have been bound had they been produced.

Objections were made to certain questions put to Sierts on the ground that they embodied certain conclusions. We shall not repeat the questions, but what are termed conclusions seem mere references to matters in evidence to which it was sought to direct the witness' attention.

It is also urged that it was error to refuse to give the jury a cautionary instruction to the effect that what the witness Sierts read from his memorandum book depended for its credibility upon the testimony and credibility of the witness himself. We think the instruction was properly refused. A general instruc-

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tion relating to the credibility of witnesses was given and the court was justified in refusing an instruction of that character which, in effect, singled out the testimony of a particular witness for applying the test of credibility. A cautionary instruction may be given as to the testimony of an accomplice, but the principle justifying it had no application in this instance.

3. Appellant complains of the exclusion of an offer to show what was the average number of its men and its pay rolls for the years in question. The ruling was proper. The real question for the jury was the actual amount of the pay rolls shown in some instances by the original pay rolls and in others by what purported to be correct copies of their totals. Defendant relied upon the accuracy of its reports, and the rejected proof was not only uncertain and indefinite in character but did not legitimately tend to establish the correctness of defendant's reports or to refute the testimony relied on by plaintiff, nor did it appear that the witnesses had sufficient personal knowledge of the pay rolls to testify to their amounts with any degree of accuracy.

The policies did not cover wages paid to the employees of subcontractors. On some pay rolls in evidence, the witness Sierts had written the name of the foreman who sent them in, and because it had appeared that such foreman had on certain occasions been a subcontractor under defendant, its counsel asked the witness Sierts if the pay roll so indorsed was the foreman's. The court sustained objection thereto. No harm was done, for it affirmatively appeared that the pay rolls of subcontractors did not come into plaintiff's office and that the pay roll in question was one of those on which defendant recognized its obligation to pay a premium.

4. As the policies covered wages of plaintiff's employees only and not those of subcontractors, and some policies excepted work done in certain territory, de-

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fendant requested instructions to the effect that plaintiff was required to show that each item of wages was not of wages paid by a subcontractor nor for work performed in excepted territory, but was for the particular work covered by the policies. We think the request was sufficiently covered by an instruction that it was necessary for plaintiff to show that the pay roll was one that arose under a particular policy and from the job described in the policy; but, if it was error to refuse the instructions in the form requested, it was not reversible error as the particular pay rolls plaintiff sought to prove related only to jobs defendant had reported and on which it had charged itself with the premiums. Another point urged against the refusal to give such instructions was that some pay rolls apparently included wages of employees for time taken in traveling to the jobs, which might more appropriately have been raised on a motion to exclude such evidence. If there was denial of such a motion it is not argued. But these items were relatively small and the verdict is for a much less sum than that which the jury were warranted in finding on the proof submitted.

5. When this case was here before, we decided adversely to appellant's contention that clauses in the policies, giving the insurer the right to defend and settle at its own costs actions for damages against the assured and forbidding settlement thereof by the assured without the insurer's consent except at its own cost, rendered the policies illegal on account of maintenance. The law of the case as stated on the former appeal is deemed binding on us. (*Hoxsey v. St. Louis & S. Ry. Co.*, 184 Ill. App. 410.) On this point we then adopted the reasoning in *Breeden v. Frankford Marine Accident & Plate Glass Ins. Co.*, 220 Mo. 327, 119 S. W. 576, that liability under the policies gave the insurer an interest in the litigation affecting the liability that removed such clauses from the doctrine

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of maintenance. It was then and is still our opinion that the views expressed in the case cited are in harmony with prevailing opinion, which discloses a manifest relaxation of the rigor of the common law in applying the doctrine of champerty and maintenance to modern forms of business.

6. It is urged that it was error to instruct the jury that plaintiff would be entitled to statutory interest on amounts found to be due from the time they became due under the terms of the policy. The instruction was proper, as the facts bring the case within section 2, ch. 74, Hurd's Rev. St. Each policy was "an instrument in writing" on which money became due. The money or premium became due on each policy when it expired. Defendant recognized that fact by then charging itself therewith on its books. The fact that a controversy subsequently arose as to the correct amounts of the premiums does not affect the right to interest thereon, inasmuch as plaintiff's contracts were performed and accepted and the amount due on each policy was easily calculable at the time it expired and stands finally liquidated and ascertained as of that date. (*Bauer v. Hindley*, 222 Ill. 319; *Elgin, J. & E. Ry. Co. v. Northwestern Nat. Bank of Chicago*, 165 Ill. App. 35, and cases cited therein.)

Finding no reversible error, we affirm the judgment.

Affirmed.

**Albert Wacholz, Appellant, v. Homewood Press et al.,
Appellees.**

Gen. No. 20,879. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PERIT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

Wacholz v. Homewood Press et al., 195 Ill. App. 635.

Statement of the Case.

Action by Albert Wacholz, plaintiff, against the Homewood Press, a corporation, and George H. Cotter, trading as Cotter Teaming Company, defendants, in the Circuit Court of Cook county, to recover for personal injuries sustained while employed by defendant Cotter. From a judgment for defendants, plaintiff appeals.

It appeared that plaintiff was working near a shipping platform on which were boxes containing paper, and the charges mainly relied on were (1) that a wagon belonging to the defendant Cotter was negligently backed up to the platform against one of the boxes causing one to fall on plaintiff and injure him; and (2) that his foreman had ordered him to assist in removing the boxes against his protest that there was danger under the circumstances in so doing.

LITZINGER, MCGURN & REID, for appellant.

HENRY B. BALE, ROSE, SYMMES, & KIRKLAND and CHARLES F. VOGEL, for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 471*—*when objection to cross-examination insufficient to preserve ground for review.* A general objection to a cross-examination not made on the specific ground that the cross-examination objected to was improper will not preserve the point urged for review.

2. MASTER AND SERVANT, § 699*—*when evidence to sustain finding of contributory negligence.* In an action by a servant against the master to recover for personal injuries sustained while unloading boxes from a wagon, a verdict finding plaintiff guilty of contributory negligence *held* not manifestly against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Munzer et al. v. Hillabrant, 195 Ill. App. 637.

**Hugo Munzer et al., Appellees, v. Kate K. Hillabrant,
Appellant.**

Gen. No. 20,960. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. JOHN M. O'CONNOR, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1914. Affirmed. Opinion filed December 21, 1915.

Statement of the Case.

Bill by Hugo Munzer and others, complainants, against Kate K. Hillabrant, defendant, in the Superior Court of Cook county, to foreclose a trust deed. From a decree of foreclosure, defendant appeals.

Complainant applied for the loan to a real estate agent in Chicago and authorized a commission to be paid therefor. The latter applied to a second party and he in turn to a third who obtained the money from a fourth party and received part of the commission.

The evidence tended to show that the loan actually came from the fourth party, who received part of the commission, and that the intermediate parties acted as agents for the borrower and not for the lender.

ROBERT B. CLARK and P. H. BISHOP, for appellant.

SAMUEL J. RICHMAN, for appellees.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

USURY, § 56*—*when evidence insufficient to establish usury.* In a bill to foreclose a trust deed, a finding by the master that the loan secured by the trust deed sought to be foreclosed was not usurious as including a commission from the lender, *held* not contrary to the evidence where there was positive evidence to sustain the finding, against which there were circumstantial facts not inconsistent therewith.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Williams v. Rowley Co., 195 Ill. App. 638.

**Samantha F. Williams, Appellee, v. J. F. Rowley
Company, Appellant.**

Gen. No. 20,965. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed with finding of fact. Opinion filed December 21, 1915.

Statement of the Case.

Action by Samantha F. Williams, plaintiff, against the J. F. Rowley Company, defendant, to recover back the amount paid for an artificial leg. From a judgment for plaintiff for one hundred dollars, defendant appeals.

It appeared that plaintiff had retained possession of the leg since delivery and that two years afterwards she came into the factory wearing the leg for the purpose of having some repairs made upon it, and wore it when she left. While she denied that she had used it in the meantime, except for the purpose of testing it, two witnesses testified that it bore evidence of use and wear. She admitted that she tried to use it, but claimed that it did not fit her and that she asked to have her money back, though she never returned or apparently offered to return the leg.

EARL J. WALKER, for appellant.

BEACH & BEACH, for appellee.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. **SALES, § 398***—*when variance exists between allegations of rescission and proof.* In an action to recover for breach of a contract of sale, whereby plaintiff purchased an artificial leg of defendant, where a count in plaintiff's declaration averred a rescission

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Williams v. Rowley Co., 195 Ill. App. 638.

evidence, *held* not to sustain the count, there being no evidence of a rescission.

2. SALES, § 398*—*when variance exists between allegation of breach of warranty and proof.* In an action to recover for breach of a contract of sale, whereby plaintiff purchased an artificial leg of defendant, where one count in plaintiff's declaration averred a breach of warranty, evidence *held* not to support the count although there was evidence of a verbal warranty by defendant, where it appeared that subsequently a written contract containing no warranty was tendered to and accepted by plaintiff.

3. EVIDENCE, § 345*—*when evidence of parol warranty inadmissible to contradict subsequent written agreement.* In an action to recover for breach of a contract whereby plaintiff purchased an artificial leg of defendant, evidence of a verbal warranty of the leg by defendant *held* properly stricken, where it appeared that a written contract not containing a warranty, but embodying the conditions under which the leg was sold, was subsequently tendered to and accepted by plaintiff.

4. SALES, § 404*—*when damages not recoverable for lack of proof.* In an action to recover for breach of warranty contained in a contract of sale whereby plaintiff purchased an artificial leg of defendant, there is no basis for an assessment of damages where there is no evidence of the value of the leg actually furnished, as the measure of damages is the difference in value between the leg furnished and that which the contract required defendant to furnish.

5. SALES, § 401*—*when evidence sufficient to show acceptance in action for breach of warranty.* In an action to recover for breach of a contract whereby plaintiff purchased an artificial leg of defendant, where it appeared that plaintiff never returned the leg to defendant, although she complained that it did not conform to the contract, evidence *held* to show an acceptance of the leg.

6. SALES, § 388*—*when buyer should be required to elect remedy.* In an action to recover damages for alleged breach of contract, where in one count plaintiff declares on a breach of warranty and in another count alleges a rescission of the contract, plaintiff should be required to elect which cause of action she would rely upon, for the reason that the remedies are inconsistent, in that an allegation of a breach of warranty implicitly affirms the sale, while a rescission involves a disaffirmance thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Montgomery, 195 Ill. App. 640.

**The People of the State of Illinois, Defendant in Error,
v. John H. Montgomery, Plaintiff in Error.**

Gen. No. 21,083. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed December 21, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois against John H. Montgomery, defendant, in the Municipal Court of Chicago, charging him with selling cocaine contrary to the statute. To reverse a judgment of conviction with a sentence of three months in the county jail and a fine of \$1,000, defendant prosecutes this writ of error.

There was no direct evidence of a sale and no evidence which did not comport with defendant's innocence. It appeared that one Clay was handed money by a police officer with which to purchase cocaine, and in the presence of witnesses he handed defendant the money and \$5 of his own, asking defendant to keep it for him. Clay stepped behind the counter and taking a bottle of cocaine, worth about \$2, and retired to a water-closet. There was no evidence of any secret understanding between defendant and Clay, or that any one else knew that Clay took the bottle. Defendant denied that any such understanding existed. Defendant returned Clay's money on request. Clay was formerly a porter at defendant's store and it was not unusual for him to ask defendant to keep money for him.

EDWARD H. MORRIS, for plaintiff in error.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

The People v. Robinson, 195 Ill. App. 641.

Abstract of the Decision.

DRUGGISTS, § 9*—when evidence insufficient to warrant conviction for unlawfully selling cocaine. In a prosecution charging defendant with illegal sale of cocaine, where it appeared that a person handed defendant money which he asked defendant to keep for him, and then stepped behind the counter of defendant's drug store and took a bottle of cocaine, after which defendant returned his money at his request, a judgment of conviction *held* not sustained by the evidence, it not appearing affirmatively that defendant knew of such taking or that there was a secret understanding between defendant and said person to effect an illegal sale.

**The People of the State of Illinois, Defendant in Error,
v. E. Robinson, Plaintiff in Error.**

Gen. No. 21,195. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN R. CAVERLY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1915. Reversed and remanded. Opinion filed December 21, 1915.

Statement of the Case.

Prosecution by the People of the State of Illinois against E. Robinson, defendant, in the Municipal Court of Chicago, charging defendant with obtaining money by false pretenses. The complaint charged that defendant "did unlawfully and fraudulently with intent to cheat and defraud by certain false representations or pretenses, obtain from one Gus Schreiber the sum of One Hundred Dollars (\$100) lawful money," etc. To reverse a judgment of conviction, defendant prosecutes this writ of error.

BENJAMIN E. COHEN, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Robinson, 195 Ill. App. 641.

MACLAY HOYNE, for defendant in error; EDWARD E. WILSON, of counsel.

MR. JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. FALSE PRETENSES, § 28*—*when information insufficient.* In a prosecution charging defendant with money by false representations or pretenses, an information wherein it is not alleged that such representations were made, the nature of them, that defendant knew they were false, and that the person defrauded believed them to be true, or wherein all such facts are included in or expressly implied from other averments in the information, is fatally defective for the reason that all such facts are essential elements of the offense charged.

2. FALSE PRETENSES, § 28*—*when information insufficient.* An information under section 6 of division 11 of the Criminal Code (J. & A. § 4105), charging that defendant "did unlawfully and fraudulently with intent to cheat and defraud" obtain money from a person named, by false representations, *held* fatally defective in that such complaint omitted the word "knowingly" as provided by the statute, and used no equivalent word therefor, the words of the information being insufficient to allege scienter.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Ex. J. H.
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